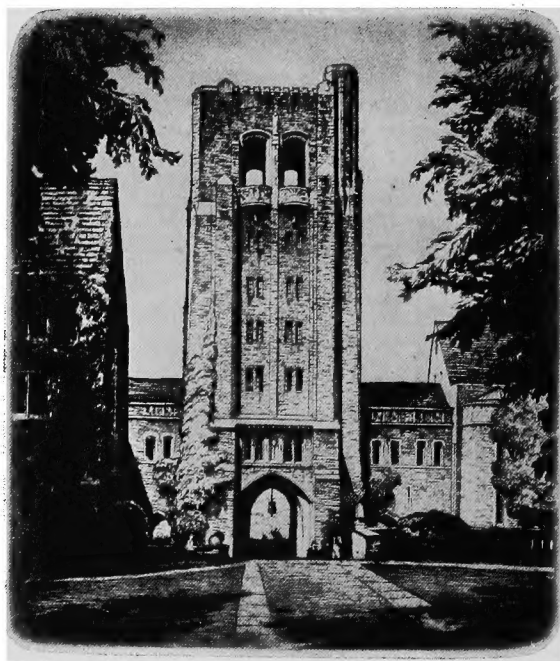


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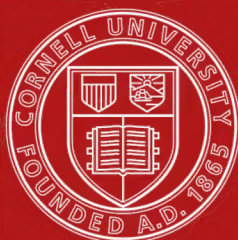
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ARNOULD
ON
MARINE INSURANCE.

SIXTH EDITION.

ARNOULD

ON THE LAW OF
MARINE INSURANCE.

SIXTH EDITION

BY

DAVID MACLACHLAN, M.A.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. I.

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PREFACE TO THE SIXTH EDITION.

A NEW Edition of this Treatise, revised throughout with assiduous reference to the authorities up to the latest decisions, including the Reports issued in December last, is here submitted to the Profession and to the Mercantile Community.

The Court of Appeal in *Stewart v. Merchants' Mar. Ins. Co.* animadverted with just severity on the retention of the 3 per cent. memorandum as affecting *ship* in the terms in which it was introduced into the policy about 1749, unmodified in any respect, notwithstanding the vast increase in size and costliness of our ocean steamers. In one of the notes to that case a suggestion is offered with a view to stimulating discussion, in order that such a reform of that memorandum may be arrived at, as may maintain a somewhat more reasonable proportion to the present development of British Shipping.

So simple a matter as the stamps and stamp laws in relation to policies is disgracefully perplexed on the face of the Statutes by piece-meal alterations on previous alterations. In the Appendix of Statutes the eye will find assistance from slight notes interspersed between the sections. At the same time the subject has been dealt with in the text in a simple and intelligible way, such as, it is hoped, will be generally acceptable.

D. MACLACHLAN.

11, KING'S BENCH WALK, TEMPLE,
January, 1887.

PREFACE TO THE THIRD EDITION.

FOR this edition of Sir Joseph Arnould's valuable treatise the text has been revised, supplemented, and modified in accordance with the latest authorities.

It had become necessary for the preservation and usefulness of the work to alter the arrangement of Part I. The Editor embraced that opportunity at the same time to collect and compact the work upon the main points of the subject, with a view to the light which parts in their natural order and connexion mutually reflect one upon another. Further to facilitate perusal and reference, he has studied compression by rejecting verbiage, repetitions, and loose observations, whilst preserving everything that was in any way pertinent; he has also prefixed to each chapter an analysis of its contents, and prefaced the whole work with a summary view (P. I. c. 1) of the contract of Insurance in its principles and parts, as it is developed and considered in the subsequent pages.

D. MACLACHLAN.

GOLDSMITH BUILDING, TEMPLE,
9th December, 1865.

PREFACE TO THE FIRST EDITION.

To make a text-book of practical utility and ready reference for English lawyers has been the first object aimed at in this compilation : to this end the matter has been much subdivided and copiously indexed, marginal notes have been added, and an endeavour made to present a methodized arrangement of the body of *English Jurisprudence*, on the subject of which it treats. To accomplish this point, without either unnecessary diffuseness, or unsatisfactory generality, seems to form the chief difficulty in these undertakings, especially where, as in the present case, almost the whole law on the subject treated of is judge-made law, and the value of previous decisions, as precedents, depends on the application of rather refined principles to frequently complicated states of fact. Could I hope that I had overcome this difficulty as completely as I have felt it, I should submit this work to the profession with much more confidence than is at present the case.

* * * * *

JOSEPH ARNOULD.

12, KING'S BENCH WALK, TEMPLE.

ABBREVIATIONS

OF

NAMES OF AMERICAN REPORTS.

THOSE marked U. St. are Reports of the United States' Courts (*i. e.* of the Federal or National Courts of the whole Union): those not so marked are the Reports of the Courts of the separate States.

Binn. Rep.	Binney's Pennsylvania Reports.
Cowen, N. Y. Rep.	Cowen's New York Reports.
U. St. Cranch, Sup. C. Rep.	Cranch's Reports of the Supreme Court of the United States.
U. St. Dall.	Dallas's Reports.
Day, Conn. Rep.	Day's Connecticut Reports.
U. St. Gall. Circ. C. Rep.	Gallisons's Reports of the Circuit Court of the United States.
Hill, N. Y. Rep.	Hill's New York Reports.
Johns. N. Y. Cases	Johnson's New York Cases.
Johns. N. Y. Rep.	Johnson's New York Reports.
Johns. Chanc. Rep.	Johnson's Chancery Reports.
Louis. Rep.	Louisiana Reports.
Mart. Rep.	Martin's Louisiana Reports.
U. St. Mason's Circ. C. Rep.	Mason's Circuit Court Reports.
Mass. Rep.	Massachusetts Reports.
U. St. M'Clean, C. C. Rep.	M'Clean's Circuit Court Reports.
Metc. Rep.	Metcalf's Massachusetts Reports.
U. St. Pet. S. C. Rep.	Peter's Supreme Court Reports.
U. St. Pet. C. C. Rep.	Peter's Circuit Court Reports.
U. St. Pet. Ad. Rep.	Peter's Admiralty Reports.
Pick. Mass. Rep., or Pickering's Rep.	Pickering's Massachusetts Reports.
Serj. and Rawle	Serjeant and Rawle's Pennsylvania Reports.
U. St. Story, Circ. C. Rep.	Story's Circuit Court Reports.
U. St. Sumn. Rep.	Sumner's Circuit Court Reports.
Watt's Rep.	Watts' Pennsylvania Reports.
Wend. Rep.	Wendell's New York Reports.
Whart. Rep.	Wharton's Pennsylvania Reports.
U. St. Wheat. Rep.	Wheaton's Supreme Court Reports.
U. St. Wheat. Dig.	Wheaton's Digest of the Reports of the United States.
Yeates, Rep.	Yeates' Pennsylvania Reports.

*The following Editions of Treatises have been used for the
references in this work.*

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ADDENDUM.

Three per Cent. Memorandum on Ship.—A ship insured in a time policy containing the usual 3 per cent. clause had ended a voyage and delivered her cargo, and was then found so foul, that she must be docked in order to be scraped, cleaned, and painted. After being placed in dock it was found on survey that her stern post had been fractured by a peril of the sea. The repair of this injury took eight days. The cleaning, scraping and painting required three days; but as both repairs and cleaning went on together, it became a question on which depended the liability of the insurer under the 3 per cent. clause how much of the dock charges were to be attributed to the repairs of the average loss.—Held, in the Court of Appeal, and by the House of Lords, that half the dock charges for the three days must be allocated severally to the cleaning and the repairs; the other five days being entirely due to the repairs. The consequence was that the insurer became liable for the average loss. *Marine Ins. Co. v. China Transpacific S.S. Co.*, 11 App. C. 573.

PART I.
OF THE CONTRACT OF MARINE INSURANCE.

CHAPTER I.

GENERAL PRINCIPLES OF MARINE INSURANCE.

MARINE INSURANCE, although perplexed with questions of great refinement and difficulty arising out of the intricate details of business and the intervention of fortuitous events, is yet of all the contracts known to the commercial law the simplest perhaps in respect of principle and the most philosophical in point of juridical development. The salutary nature of its object is pointed out by the same word which determines its principle and defines the whole course of legal decision. In its essential nature and in all its incidents it is a contract of indemnity. With this for its object, it seems to have originated with the early necessities and advantages of modern commerce. By this it is rigorously construed in our courts of justice, whatever be the use and purpose to which it happens to be bent. And from this the British Legislature have vigilantly provided that it shall not be diverted in order to serve the ends of the gambler.

Hence an insurable interest, of appreciable commercial value, in the subject of insurance is of the very essence of the right to recover upon this contract.¹ In the absence of this the plaintiff is not damnified, although there has been a total loss, and notwithstanding he may have had at the time of effecting the policy such an interest as enabled him then to make a valid contract. If A. has a cargo of seed on its way by the ship *Pomona* from Taganrog to London, covered by an insurance to the full value, and sells it before arrival to B., the policy from the moment of the sale ceases to be of any value to A. But to B., in virtue of his acquired interest in

Insurable
interest.

¹ *Lucena v. Craufurd*, 2 B. & P. N. R. 269.

the cargo, it becomes of value in case A. agrees to hold the policy on his behalf or assigns it over to him.¹ If B. before the arrival of the ship resells the cargo to C. to be delivered at London, C. is incapable of an assignment of the policy because the entire risk remains upon B.,² and therefore B. retains his insurable interest notwithstanding his sale of the cargo, and is entitled to recover on the policy in case of loss. Any damnification of C. following upon a loss of the cargo by perils insured against, cannot arise except from a breach of B.'s contract to deliver, and therefore that is the basis and form of his action. But if C. were nevertheless allowed to recover on a policy upon the cargo, this right to recover could not arise upon a contract of indemnity, that is of marine insurance, since by supposition he has no interest in the cargo at the time of its loss³ through which he could be damnified by its destruction.

Wager
policies.

A policy such as could be underwritten for C. under the circumstances in this hypothesis would be a contract not of indemnity but by way of wager on the event of the voyage. Policies of this nature appear to have come much into vogue in this country at a time when the romantic nature of British adventure in the Eastern Seas had the effect of introducing extravagant speculation into the business of the merchant, and of at length inducing all classes to run riot in this species of lottery, eager to brave ruin for the uncertain chance of instantly realizing a fortune. These contracts were decided to be lawful, and continued to be so held in our courts of justice until the Legislature interfered in 1746, having in 1720 passed the Bubble Act and in 1734 the Act against Stockjobbing. On less doubtful principles than in the two other instances the 19 Geo. 2, c. 37, declared all policies by

¹ *Powles v. Innes*, 11 M. & W. 10.

² See *North of England Pure Oil-cake Co. v. Archangel Maritime Bk. & Ins. Co.*, L. R., 10 Q. B. 249.

³ Differing therefore entirely from life insurance, which is merely a contract to pay a sum of money on the

falling-in of the life; *Dalby v. The Indian and London Life Assurance Co.*, 15 C. B. 365; a perfectly legal contract, though not of indemnity, provided it be within the limits prescribed by the 14 Geo. 3, c. 48.

way of gaming or wagering to be illegal in respect of British ships and cargoes, with some few and these now almost obsolete exceptions. It is surprising to find an English lawyer so late as the time of Mr. Christian's edition of the Commentaries disputing the existence of any difference between these and contracts of marine insurance properly so called. It is unnecessary to appeal against this opinion, as does Mr. Phillips to the authority of Emerigon and Valin; the distinction rests on the essential nature and objects of Marine Insurance as being a contract of indemnity; a distinction held in view by the jurisprudence of all commercial countries, and so strictly observed now by the spirit of English law that a policy not expressly dispensing with proof of interest implies an insurable interest, which he that puts the contract in suit may be put to prove in the Courts of this country.

Out of this essential character of the contract arises the Good faith. necessity for that good faith which is required to a greater degree in this than in any other contract not made between persons in confidential relations.¹ On questions of purchase and sale, provided there is neither fraud nor misrepresentation on either side, the prevailing maxim of the law is *Caveat emptor*.² In contracts of guarantie, the guarantor voluntarily assumes the position of friend to him whose credit is in doubt, thereby impliedly waiving all information beyond that which his questions provoke, so that the only obligation on the other side in respect of prior information is not to conceal when inquiry is made.³ An entire change of obligations takes place in respect of the parties when strangers come together to negotiate a contract of indemnity. This probably never happens upon view of the subject of insurance: most probably that is at an unapproachable distance, and in the midst of the very perils against which an indemnity is sought. The nature of these

¹ Carter v. Boshm, 3 Burr. 1906.

⁴ Exch. 49.

² Parkinson v. Lee, 2 East, 314;
and see Jones v. Just, L. R., 3 Q. B.
197, and Mody v. Gregson, L. R.,

³ Lee v. Jones, 14 C. B., N. S.
386; 17 C. B., N. S. 482; 34 L. J.
(C. P.) 131.

perils, be it of harbours, rivers, or seas, is matter of common knowledge between them. That the ship, whether she be the proposed subject of insurance or the actual means only of carriage, is tight, staunch, strong, and in every way fitted for the voyage, is the most favourable assumption from which the negotiations can start. That then being assumed as a fixed condition of their stipulations, the existence meanwhile of any state of facts which has the effect of removing entirely or somewhat aggravating the necessity for insurance, if a matter peculiarly within the knowledge of that party whose interest lies in misrepresenting or concealing it, goes to the essence of the contract, and if covered by the terms of the policy without the consent, in consequence of the ignorance, of the other contracting party, renders the contract a nullity. The underwriter, *e.g.*, privately knows that the ship has arrived all safe, or the merchant that she is wrecked, or has taken the ground, or has necessarily sought a port of distress for repairs; the contract made in ignorance of this is of no binding force on the other party. On the contrary, if made in ignorance by both, and the subject of insurance is existing, or the words *lost* or *not lost* be introduced,¹ the contract is binding.² It hence appears that marine insurance is a contract *uberrimæ fidei*, not because it appeals specially to the popular sentiment of fairness, or the stricter notion of equity, but because being a contract of indemnity it supposes disclosures frequently adverse to the interests of the man required to make them, simply however in order to that consent and agreement *ad idem* between the parties without which any contract whatever is altogether impossible.

Conditions of
the contract.

An indemnity however against the consequences of a person's own negligence or wrong would be a contract, if persons were found inconsiderate enough to enter into it, inimical to sound public policy and the general interests of mankind.

¹ I am aware that I am here introducing a proviso which some think unnecessary.

² Accordingly, per Bramwell, B.,

Stone v. Marine Ins. Co. Ocean, Limited, of Gothenburg, 1 Ex. Div. 81, 85; Bradford v. Symondson, 7 Q. B. D. 456; 50 L. J. (Q. B.) 582.

But marine insurance, being wholly and only a contract of indemnity, is therefore universally received and construed as involving certain unexpressed but well-understood conditions against the negligence or wrong of the parties, in virtue of which upon the intervention of such wrong or negligence the contract becomes void.

The very chiefest of these comprises that assumption already described as the one fixed point among all the unstable, ever-shifting, and uncontrollable elements with which the contract deals. The winds and the waves are not under the hand of man. Yet their ordinary strength may be calculated; their usual moods and shifting varieties may be humoured. The ship may be made strong to contend; she may be manned and equipped with skill, rope, sail, and rudder to trim to the winds and to ride the waves. These are things within the compass of human power to foresee and provide for. It is not unreasonable to expect such provision at the hand of the assured. In his own interest he would certainly do his best to protect himself against such casualties of maritime traffic. He is not allowed to slack this effort when he puts himself under the protection of another who assumes the risk. He cannot even shift from his own shoulder the responsibility of seeing by inspection whether the state of the vessel fulfils the requirement. It is a tacit condition in the contract that the ship is seaworthy; the insurer proceeds upon the footing that she is so, and if she be otherwise the assured is unprotected, notwithstanding the policy.

Seaworthi-
ness.

But as the ship may be insured to lie in port, to navigate rivers, or to sail the ocean, seaworthiness, the commoner expression in use to describe the condition in question, is necessarily a relative term capable of a meaning suitable to whichever of these intentions may be expressed in the policy.¹ A different state of the hull, rigging, and stores, a different state of the crew is signified by the term as it

Relative use
of the term.

¹ Per Parke, B., *Dixon v. Sadler*, 33 L. J. (Q. B.) 17; *Bouillon v. Lup-
ton*, 33 L. J. (C. P.) 37.
5 M. & W. 414; *Knill v. Hooper*, 2
H. & N. 277; *Burges v. Wickham*,

Restricted demands of the law in respect of this condition.

In case of time policies.

Condition against the assured's own wrong.

becomes applicable to a contemplated difference of circumstances affecting the ship. Yet here again a new difficulty arises. Mere duration of time being a measure of incessant decay, the seaworthiness of the ship deteriorates every hour from that cause alone, irrespective of the active forces which assail her, producing tear and wear.¹ Human power is quite insufficient to keep her seaworthiness permanently up, and if the policy were to be void upon this falling below a fixed point, insurance would practically be a nullity. Human laws however make account of human weakness; they are satisfied if the ship be seaworthy at the time when the policy attaches,—that is to say, when she begins to lie in port, or breaks ground to set forth on her voyage.² It is a remarkable extension of this philosophical indulgence accorded to human infirmity that by the English law this condition is held inapplicable to time policies, except perhaps under circumstances both special and rare. The period of insurance might expire in the middle of a voyage under circumstances in which the ship neither was nor could be made seaworthy, and the assured might be prevented by this condition, if it attached, from effectually renewing the policy in presence of the very perils that render insurance expressly desirable. This general rule of marine insurance was therefore in such a case dispensed with in favour of that universal canon of law,—*ad impossibilia nemo tenetur*.³

Again, if a man of his own wrong do that which exposes his vessel or his cargo to loss,—if he knowingly or negligently send the ship to sea in an unseaworthy condition,⁴ —if he employ the ship in a trade that is illegal,—for instance, to run smuggled goods or to commerce with the

¹ Per Privy Council, in *Biccard v. Shepherd*, 14 Moo. P. C. 471.

² Probably the law of the United States is more exacting.

³ *Gibson v. Small*, 4 H. of L. Cas. 353; *Fawcus v. Sarsfield*, 6 E. & B. 199—205; *Dudgeon v. Pembroke*, 2 App. Cas. 284. The law of the United States is not quite in accord-

ance with this.

⁴ *Dudgeon v. Pembroke*, L. R., 9 Q. B. 581; 1 Q. B. D. 96. The judgment of the Court of Appeal in this case, to the effect that there is an implied condition of seaworthiness in time policies, was reversed by the Lords, 2 App. C. 284.

enemy,—or if he constitute the cargo of uncustomed goods, or comprise in it goods which are contraband of war,—or if he offend against the laws of his own country or those of that which he is trading with, or, during the existence of a war, although his own country be no party to it, against the law of nations by sailing his ship imperfectly or improperly documented,—he forfeits his right to protection under the policy, in virtue of one of those tacit conditions on which the contract, as one of indemnity, limited and modified by the submission exacted of the parties by these various laws, necessarily proceeds. *Nullus commodum capere potest de suâ injuriâ propriâ.*

Already we have adverted to one of the chief assumptions at the basis of the negotiations for a policy, that the ordinary character of the navigation involved, its perils, difficulties, and intricacies, is matter of common knowledge between the parties. Without any mention of them, the underwriter is held to be cognizant of all such risks as are immediately proper to the navigation involved. Indeed, so extremely to the verge of these natural risks of the voyage is the construction of the contract pressed against him, that the existence of an established light was held to be no element proper to his calculations, notwithstanding its importance was so confessedly great that, in a time of war, it was extinguished with a hostile intention against vessels navigating that coast.¹

Things assumed as known to the insurer.

It is a counterbalance to these obligations of the insurer that the assured is tacitly bound to observe the limits prescribed to him by usage in pursuing the voyage. The most obvious breach of this general obligation is by deviation without just cause or express permission from the proper route between the termini laid down in the policy.² A ship-owner might indefinitely aggravate the risks either by calling at intermediate ports or cruising for one purpose or another

Obligations of the assured in accordance with the foregoing assumption.

¹ *Ionides v. The Universal Marine Ins. Assoc.*, 14 C. B., N. S. 259; 32 L. J. (C. P.) 170.

² *Elliott v. Wilson*, 7 Brown, P. C. 459; *Davis v. Garrett*, 6 Bing. 716.

in the open sea, but it is impossible to suppose that he could thereby enlarge the obligations of the other party to the contract. The condition we are considering thus appears to be something more than the result of conventional usage. It necessarily enters into the essential notion of such a contract as that of marine insurance.

Breach of condition need not be the cause of loss.

There is this one thing which is common to all the conditions whether implied or expressed in the contract of marine insurance, that it is quite unnecessary to trace the loss to the breach as the cause of it. The breach immediately avoids the contract; it is the subsequent occurrence of loss which gives the previous breach its importance, and there is a natural, but erroneous tendency of the mind to assume that some immediate connection should exist between them, such as would place them in the relation of cause and effect. The contract is void from the committing of the breach, and the subject of insurance remains afterwards uncovered as to the perils in the policy.¹ An illustration of this same rule of law, operating indeed a different result, is furnished by the effect given to the memorandum—"free of average unless general or the ship be stranded." If the vessel be stranded at any point in the course of the voyage, and an average loss at the same or any *other* point occurs, the assured is entitled to recover, notwithstanding the entire want of any connection between the loss and the stranding, provided only in case of a policy on goods that at the time of the stranding the goods were on board.²

Actual exposure to the perils indispensable.

What is hitherto said shows how impossible it is to speak of marine insurance without reference to perils. They are the occasion of the contract being made, and without exposure to them it never applies.³ With the commencement of such exposure of the subject insured, the policy is said to attach, and any loss that occurs before, let the cause be what

¹ *Davis v. Garrett*, 6 Bing. 716.

in *Roux v. Salvador*, 3 Bing. N. C. 266.

² *Burnett v. Kensington*, 7 T. R. 210; see the argument and judgment

³ *Halhead v. Young*, 6 E. & B. 312; *Harrison v. Ellis*, 7 E. & B. 465.

it may, is uncovered. Therefore a ship insured for a voyage to such a place "from London" may be burnt or sunk, or otherwise suffer a total or an average loss in the port of London without any right of recourse against the underwriter. The perils against which he indemnifies begin under such a policy from the moment that the vessel breaks ground to set forth on her voyage. The risk in a voyage policy on ship usually continues till the vessel "is moored at anchor twenty-four hours in good safety." The beginning and the ending are fixed by the terms of the contract. Suppose a total loss happens before the policy attaches, the underwriter pays nothing, and returns the premium received; the former for the reason already given, the latter because there has been a complete failure of consideration for what was otherwise a valid and binding contract. If the policy have been made in ignorance that the ship had already arrived, the risk, not of future peril, but of damage already sustained on the voyage, involves the liability of the insurer on his contract, and consequently entitles him to retain the premium.¹

We have been considering a very important limitation upon the contract. Another of not less importance remains to be considered. If the underwriter had undertaken to stand between the assured and any loss or damage of the subject of insurance, however caused in the course of the voyage, many would find their opinion of his liabilities justified, and some juries their verdict sustained, by the contract between the parties. But the contract expressly specifies the perils insured against, and the law afterwards discriminates with a just precision between the direct and indirect operation of attendant causes, which, though adequate to the effect, and even contributory to the result, might not, in fact, be the proximate, immediate, producing cause of the loss. "It were infinite," says Lord Bacon, "for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of

The loss must be by the perils insured against as *causæ proximæ*.

¹ *Stone v. Marine Ins. Co. Ocean, Limited, of Gothenburg*, 1 Ex. Div. 81, 85.

acts by that, without looking to any further degree." The general maxim thus explained, which is not inapplicable to the acts of voluntary agents, is of singular applicability to the operation of natural causes: In jure (assecurationis maritimæ) causa proxima, non remota, spectatur. Under a policy on cargo, where coffee from Rio Janeiro to New Orleans or New York was expressly warranted "free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and free from all consequences of hostilities, riots or commotions," it appeared that a well-known long-established light on Cape Hatteras, in North Carolina, of great importance to the navigation of that coast, had been put out, as an act of hostility against Federal shipping, and that the ship with the coffee on board, though she had got out of her proper course, might have seen the light if burning, and been saved by it, but in the absence of the light went ashore near that cape, and the cargo, except a small part, was lost in the ocean in consequence of the extinction of the light. If ever a contract were to give law to the parties this was a case that seemed to be within the terms of the warranty. But the Court, obliged by the nature of human law and man's faculties, to set a limit to the meaning of the term "consequences," and thereby exclude the necessity of being afterwards driven in logical consistency to deal with what is beyond the comprehension of human Courts, the causes of causes and the consequences of consequences, accepted the limit so familiar to insurance law, and held that "consequence" in such an instrument meant a constant effect. The defendant could not say that a ship could not pass that cape in the ordinary route of a coasting voyage during the absence of the light; and the plaintiff therefore recovered as for a loss by perils of the sea. The extinction of the light was the *causa sine quâ non*, the winds and waves were the *causa proxima*.¹

The natural
effects of

By this easily traceable line are the liabilities of the

¹ *Ionides v. The Universal Marine Ins. Assoc.*, 14 C. B., N. S. 259; 32 L. J. (C. P.) 170.

underwriter for loss or damage defined on one side by the law of insurance. Another line, however, is still necessary to determine certain exemptions in his favour, but for which, on taking a premium to insure, he would be assuming a dead loss and certain ruin.¹ Thus, if a vessel quits port in a leaky condition, the policy is no protection against loss by foundering at sea; nor is it against the action of worms on the hull, if, for example, the ship is sailed in the Mediterranean without sheathing; nor against the chemical action of sea-water on an electrical cable, if it be laid down with the coating so imperfect that the copper wire is exposed; nor against the natural heating of a cargo of seed, whether or not it be put on board in a damp condition; nor against other natural decay, called inherent vice, of perishable commodities, such as fruit, fish, and the like, when kept too long. Some of these things are expressly warranted free of average, or of average under a certain per-centage, notwithstanding it be the result of extraordinary circumstances and perils. But irrespective of such warranties, and beside and beyond them, the law presumes that the assured owner knows the ordinary course of things, and takes upon himself all the consequences that naturally flow therefrom in connection with the property insured.

ordinary
causes are
excluded.

But for these indispensable limitations, insurance would be impossible. It is consequently as much for the advantage of the mercantile community that they should be observed, as of the body of insurers that no verdict of any jury should transgress them. Essential to the very notion of an indemnity is the accurate and nice ascertainment of the perils insured against, not only in respect of their class and description, but also in respect of the field of their operation. The English law, since the extinguishment of wagering policies, is, in these respects, all that reason and justice could demand; and the sense of security procured and guarded by such principles and precautions is now entirely in the keeping of English juries.

Importance of
these limits
being ob-
served.

¹ *Paterson v. Harris*, 1 B. & S. 336; 30 L. J. (Q. B.) 354.

Abandonment.

Nothing remains but to advert to the question of abandonment, as affording another illustration of the same simple view of this contract upon which the various distinctions recognized by our law with regard to it are founded. It is not our intention here to attempt a catalogue of the various ways in which the assured may be deprived of his property within the meaning of this contract. It is obvious that between possession of it in safety and its annihilation, for instance, by fire, or its entire loss, for example, by foundering at sea, the possible variety and modification of loss is indefinite.

It is pertinent to our purpose, however, to point out that there may be a total loss, for example, through capture by the enemy, that shall cease to be a loss, for instance, by recapture, or by restitution under sentence of a court of prize. There may be a loss which is not total, but for all practical purposes is nothing else, that is to say, it must for the purposes of the policy be construed as a total loss. There is a constructive total loss of the ship, when by perils of the sea she is converted into such a wreck that it would cost more money to repair her than she would afterwards sell for when repaired. The assured may in these circumstances give the underwriters notice that he abandons the wreck to them, and claims for a total loss. But the underwriters are not bound to act upon his construction of existing circumstances and accept the abandonment. He may unintentionally misconstrue the state of facts, and this may be proved against him in many ways, one of which would be by recovering and restoring the ship to him in such a condition that he is not at liberty in law to refuse it.

The actually existing circumstances of the vessel, however, when notice of abandonment was given, may have been such as to justify the notice in law. If the assured, notwithstanding the underwriter's refusal to accept the abandonment, begins an action on the policy for a total loss, while the circumstances continue to be such as justify an abandonment, any restitution afterwards of the ship cannot take away his right to recover for a constructive total loss. This depends

on the nature of an action, which has regard only to the state of facts between the parties at the time of writ issued. If, on the contrary, restitution of the ship in a condition proper to be accepted by the assured owner were before action commenced, although after notice of abandonment given, the right of action against the underwriter is gone. This difference is not a mere technical distinction due to refinements on law by the lawyers. Justice, in order to determine the dispute between litigants, must confine its regards to some fixed instant of time, at which the facts may be ascertained as the foundations of judgment. But if, before the assured has gone into Court, there be a restitution of his property, he ceases to be in a condition requiring to be indemnified against a total loss, and his notice of abandonment, though once valid, is obliterated to the eye of justice by the state of facts which have subsequently supervened. His constructive claim to indemnity ceases to exist by the effect of subsequent events before he can assert it in law by issuing of the writ.¹ The notice indeed was necessary, and may at the time have been valid because the loss existing may have been no more than constructive. But though the loss be *prima facie* total, as in the case of capture, and notice of abandonment have been given, still, for the same reason, if there be restitution before action commenced, occasion for such indemnity no longer exists in respect of the past, and any foundation for asserting the right by legal claim is consequently gone.

Such is the English law as it proceeds severally upon the right construction of the nature of the contract between the parties, and upon the essential view of a legal assertion of right by commencement of an action. The Legislature might have interfered, as in France, by declaring that a notice of abandonment once given under circumstances that sustained its validity could not be superseded, except with the consent of both parties, by any subsequent change of circumstances. Or, instead of leaving the parties to determine in each case

¹ See per Lord Mansfield, *Hamilton v. Mendes*, 2 Burr. 1210.

upon the facts arising whether the loss be or be not so nearly total as for all practical purposes it ought to be so construed, the British Parliament might have enacted, as the law is in the United States, that damage to the extent of 50 per cent. and upwards of the value of the property insured is to be construed a total loss. All that the British Legislature and the English judicature have done is to prevent either party, to the injury of the other, and consequently of the mercantile community at large, from perverting the contract between them to purposes which are alien to the essential notion of indemnity, on which alone it is wholly based.

Definition of terms.

The following is a definition of some of the principal terms in use upon the subject of marine insurance.

Marine insurance is a contract whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea-risks, to which his ship, merchandise, or other interest, may be exposed during a certain voyage, or a certain period of time.

The party interested in the property insured is called the insured or assured; the property insured—the subject of insurance: and the interest which the assured has in this property—his insurable interest.

The party undertaking to indemnify the assured against loss is called the insurer or underwriter; and the stipulated sum for which he undertakes to indemnify him, the premium.

The instrument by which the contract of indemnity is effected is called in England the Policy.

That which is insured against, is loss arising from marine casualties. These casualties are in technical language called, sometimes, the perils insured against, and sometimes the risks covered by the policy, expressions which mean one and the same thing, and are employed to signify those causes of loss against the effect of which the underwriter undertakes by his contract to indemnify the assured.

The interest of the assured is technically said to be covered by the policy, when the sum or aggregate of sums insured in the policy is sufficient to afford him full compensation for

whatever loss that interest may sustain. If the value of his interest exceeds the sum insured, the excess of interest is said to be "uncovered by the policy," and the assured to be "his own insurer to that extent."

When the liability of the underwriter commences under the contract, the technical mode of expressing this is by saying that "the policy attaches," or "the risk begins to run," from that time.

CHAPTER II.

THE SUBJECTS OF MARINE INSURANCE.

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WHAT things are insurable, considered in themselves, and irrespective of their owners, is the first practical question, and naturally falls to be considered here, the first in order.

Ship.

The ship was probably not the earliest subject covered by this contract. Important and indispensable though it be to commerce, it is yet no more than subservient and therefore secondary to the purpose of commercial intercourse, the distribution, namely, among distant nations of the products of nature and skill. Merchandise, therefore, in its importance as the chief thing in view is not unlikely to have been the earliest in course of time of the subjects underwritten by the insurer, yet the ship would soon follow as a subject of insurance; and all the sooner that in those times the merchant was also the shipowner uniting in himself the interests of both, and preventing those jealousies that might have arisen if these interests had already appeared divided and conflicting.

What is covered by policy on *ship*.

The term *ship*, technically taken, designates a particular species of sea-going vessel, square-rigged throughout, which

carries three masts with tops and yards to each of them. It has also a generic sense, as designating a vessel of burden, irrespective of rig, and without regard to the particular means of locomotion. The common popular use of it is in this generic sense; and in policies of marine insurance, where nothing appears to qualify the meaning, it has the same acceptation. In the statutory form, indeed, of the Lloyd's Policy¹ this term when first used is identified in effect with that other most general term *vessel*, and as if the purpose of explanation had thus been satisfied, the alternative designation is afterwards dropped, and the term *ship* alone is used throughout the rest of the document. I believe, however, this explanatory addition to have been inserted *ex majore cautela*, and to be superfluous rather than necessary.² At the same time there are cases involving a serious increase of risk, in which the common designation might mislead, and might in consequence amount perhaps to such a misrepresentation as would invalidate the policy. For instance, it would not be advisable to propose *The Thetis* for insurance and to effect a policy on her by the words *on ship* without specifying in the proposal or the policy, or in both, that she was a steamship. This, however, is a case of representation founded indeed on description, and the inquiry would be as to whether there had been such *consensus* of the parties as is indispensable to the existence of any contract between them.

So much as to the meaning of the simple designation, and as to the question what species of craft is comprised within it. Another question, much more agitated than this, is as to whether certain of the details which are borne by the

¹ 30 & 31 Vict. c. 23, Sched. E.

² Emerigon (c. vi. § vii.) says, "The word *navire* comprehends every structure of carpentry fit for floating and making way on the water. Shallops and the smallest vessels are comprehended under the same denomination. Rafts are also comprised

therein. According to all our dictionaries, the word *vaisseau* is not less generic than *navire*." For the older authorities who explain the use in modern commerce of the Latin terms, I refer the reader to Emerigon's work.

floating structure thus designated be legally comprised within the term, and consequently be covered by a general insurance *on ship*.

In our common printed forms the policy, after stating that it is effected "upon any kind of goods and merchandises," proceeds thus—"and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the," &c. When the insurance is intended to be confined to the ship alone, this is generally effected by inserting, either at the foot or in the margin of the policy, the words "on ship;" or by stating in the valuation clause that, as between the assured and underwriters on the particular policy, the subject of insurance is agreed to be the ship, or as many sixty-fourth shares thereof as the assured owns. The effect of either mode of specifying the subject of insurance is to obliterate, as it were, such other words of the general form as are inapplicable to the specified subject;¹ and therefore the interest of a mortgagee, for instance, if misdescribed as *bottomry*, would remain uncovered by the policy, although, but for this rule of construction affecting other parts of the instrument, there are printed words in it which would cover a mortgage notwithstanding the misdescription in manuscript.² It is hardly necessary to remark, that a policy in this form on ship alone, even when effected by one who is owner both of the ship and cargo, cannot extend to protect the latter.³

Not any part
of the cargo.

Provisions
comprised as
part of the
ship, under
the word
"furniture."

In the next place, it may now be laid down as certain, that the provisions put on board the ship, when she sails, for the use of the crew on the voyage, are comprehended under the word "furniture," and would be protected by an insurance on the "body, tackle, apparel, ordnance, furniture," &c., of

¹ See the general principle which subordinates the printed portions of the policy to the effect of those in manuscript, laid down in *Robertson v. French*, 4 East, 130, 140, 141; *Haughton v. Ewbank*, 4 Camp. 89;

per Lord Penzance, *Dudgeon v. Pembroke*, 2 App. Cas. 284, 293.

² See *Simonds v. Hodgson*, 6 Bing. 114; and *S. C.* in error, per Lord Tenterden, 3 B. & Ad. 50.

³ 1 Marshall, Ins. 328.

the ship, as in the common printed forms.¹ The contrary position had been erroneously inferred from the case of *Robertson v. Ewer*, which decided no such point, but merely established that the underwriter on ship could not be liable for the consumption of such provisions, while the ship was detained by an embargo.²

The word outfit is sometimes used to denote the necessary stores and provisions put on board the ship for the use of the crew on the voyage; and, in this sense, outfit is included in a general insurance on ship. It is in this sense that Lord Ellenborough uses the word when he says, that "hull and outfit are both protected by an insurance on ship."³

And outfit, in the sense of stores and provisions.

In whaling voyages, however, the word outfit has a peculiar sense, and means the fishing stores of the ships so employed; namely, the harpoons, lances, spears, and whale lines, for the purpose of catching whales and seals on the voyage, and the casks, cisterns, boilers, &c., for preparing and containing the oil and blubber; in a word, all the instruments and apparatus necessary for taking the fish, and preparing and bringing home the animal produce.⁴ It is now established by decision that outfits in this sense are not protected by a general insurance in the common form on the "body, tackle, apparel, &c., of the ship";⁵ and the practice in the United States, accordingly, is to describe the different interests insured in a fishing voyage, as "ship, outfit, and cargo."⁶ Yet the Courts have, notwithstanding, held that these fishing stores were to be valued as part of the "ship," under the former statutes for limiting the responsibility of owners in certain cases.⁷

Not so the fishing stores for whaling voyages.

Mode of insuring whaling risks in the United States.

¹ *Brough v. Whitmore*, 4 T. R. 206.

² *Robertson v. Ewer*, 1 T. R. 127; and see per Buller, J., 4 T. R. 210.

³ Per Lord Ellenborough in *Hill v. Patten*, 8 East, 375; per *id.* in *Forbes v. Aspinall*, 13 East, 323, 325.

⁴ 8 East, 375; *Gale v. Laurie* (The *Dundee*), 5 B. & Cr. 156.

⁵ *Hoskins v. Pickersgill*, 3 Dougl. 222; 1 Marshall, Ins. 241; 1 Park,

Ins. 126. Admitted in case of The *Dundee* by Lord Stowell, see 1 Marshall, Ins. 241; and by Lord Tenterden in *Gale v. Laurie*, 5 B. & Cr. 156, 164; see *Hill v. Patten*, 8 East, 373, 375.

⁶ 1 Phillips, Ins. no. 496, 497.

⁷ See The *Dundee*, 1 Hagg. Ad. Rep. 109; *Gale v. Laurie*, 5 B. & Cr. 156. The English law on this point no longer founds upon the actual

In policies on steamships, although it is not unusual to mention the machinery besides the hull, as for instance, *on hull and machinery*, yet this seems to be unnecessary. Since the term *ship* in a policy in which the vessel insured is stated to be a steamer would suffice to cover both; and indeed there is commonly an object to be served by distinguishing between these two parts of the same fabric, *e. g.*, when a distinct amount is expressed to be insured on each, and for the purposes of average and other similar results they are stipulated to be taken as if separately insured.¹

The *boat*,

It will be observed that the "boat" is included by name as part of the ship in the common policies of insurance; and there is no doubt, notwithstanding the opinion of certain authorities,² that it forms part of the outfit included under *ship* as the common designation for the whole. In one case where the policy was *on ship* in the common form, *viz.*, upon the "body, tackle, apparel, munition, ordnance, boat and other furniture" of the ship, the underwriters resisted a claim for the boat; but this upon the ground that there was a usage never to pay for boats outside the ship slung upon the quarters; the underwriters did not succeed in their contention, but even their success would have left the present point unchallenged in the law of insurance that the boat is part of the ship and without express mention in the policy would be covered under that term.³

The *interest*
need not be
disclosed.

We shall see towards the end of this chapter that, as a general rule, the nature and extent of the interest which the assured has in the subject of insurance need not be disclosed on the face of the policy. Hence a mortgagee of ship may, it seems, on a general policy *on ship*, without more, recover to the extent of his interest.⁴

value of the ship, but upon a fixed tonnage value; see *MacLachlan on Shipping*, 17, 122, 123.

¹ See *Oppenheim v. Fry*, 3 B. & S. 873; 5 *id.* 348; 33 L. J. (Q. B.) 267.

² See *MacLachlan on Shipping*, 16, 17.

³ *Blackett v. Roy. Exch. Ass. Co.*, 2 C. & J. 250. See 1 *Emerigon*, c. vi. sec. vii. § 2.

⁴ *Irving v. Richardson*, 1 Mood. & Rob. 153; *S. C.*, 2 B. & Ad. 193.

The rule is the same in the United States. There the owner of a ship who had chartered half of her, the mortgagee, and (though this was in one case doubted) the mortgagor, have all been allowed to recover to the extent of their respective interests under general policies *on ship*, in which the nature and extent of their interest were not disclosed.¹

In one case Lord Ellenborough seemed to think that the interest of captors who had no grant, but only a reasonable expectation of a grant of the captured property, must, if insurable at all, be specifically described in the policy:² but the interest vested in the Crown, on its adoption of the captor's insurance, may be covered by the common form of policy.³

Query, of the interest of captors.

Among other losses which might fall upon ship that would not be covered by a policy of this description, it is only necessary to refer to the enumeration in the Merchant Shipping Act Amendment Act, 1862, sect. 54, of loss of life, personal injury, loss or damage to goods on board, and of similar losses, damage and injuries occasioned on board another vessel by the ship in question. By sect. 55 of the same statute, the validity of policies effected against any or all of the enumerated risks is established against any objection to the nature of these risks. A specific description, however, is indispensable to bring them within the scope of a policy adapted to cover them.⁴

Risks from collision.

A vessel covered by a general policy *on ship* came into collision with another in the Hooghly river with such damage to both and under such circumstances that, in accordance with the rule of maritime law, at that time followed only in the Admiralty Court, the damage to both was equally shared between them. The owner, under such a policy, recovered

¹ See the cases collected by Mr. Phillips, vol. i. no. 421 et seq.

² *Routh v. Thompson*, 11 East, 433. His Lordship seems to rank it with expected profits, to be described therefore as a chance in the policy, the right to recover depending on proof at the trial that this chance would have been a reality but for

the intervention of the perils insured against.

³ *S. C.*, 13 East, 274.

⁴ A new species of association, denominated Shipowners' Mutual Protection Association, has sprung up for the insuring of these and other risks and liabilities not within the "scope of an ordinary Lloyd's policy."

only the amount of the damage actually sustained by his own ship, and had to bear the excess allotted to him under the law maritime.¹

It is now common to insert special indemnity clauses in policies, to provide against risks of this nature.² If such a clause be to indemnify in a certain proportion of all sums paid to an amount not exceeding the full value of the ship, and in a damage cause the vessel be sold under decree of the Admiralty Court for a less amount than her value, the assured cannot recover more under the policy than the amount paid under the decree.³

Goods.

What is covered by goods or merchandise.

In all probability *merchandise* was the earliest subject to which insurance was applied; it is now at all events a good subject of a policy. But this, or that other generic term *goods*, is exceedingly general and indefinite, and therefore we proceed to inquire what is, or is not, covered by a policy on *goods*. It is unnecessary, in most cases, for the merchant, who wishes to insure his merchandise against sea risks, to do more than give a general description of it as *goods* or *merchandise*. Under such a policy, in case of loss, the merchant

¹ De Vaux v. Salvador, 4 A. & E. 420. Story, J., dissented from this decision, and was confirmed in that opinion by the Sup. Ct. U. S.; Peters v. Warren Ins. Co., 3 Sumn. C. C. 389; S. C., 14 Pet. 99. But the Supreme Court appears in a subsequent case to have reconsidered the principle involved in that decision, and to have dissented from it, adopting as one of the grounds of their judgment the principle laid down by Lord Denman in the above case; see General Mut. Ins. Co. v. Sherwood, 14 How. 352; 1 Phillips, Ins., no. 1137a. The principle of Lord Denman's decision remains untouched by the recent change in the law, 36 & 37 Vict. c. 66, § 25, no. 9, according to which this rule, peculiar formerly to

the Admiralty Court, is now the law of the English Courts, sharing the damage between both where both are to blame for the collision of the ships; MacLachlan, Shipping, p. 306.

² Instead of attempting by a single clause to define and provide against a variety of specific risks, it were much easier and safer to do this by reference to the section or sections or parts of a section of the statute. In Taylor v. Dewar, 5 B. & S. 58; 33 L. J. (Q. B.) 141, it was held that a clause "in case the vessel should run down or damage any other ship, &c.," did not cover damages paid by reason of loss of life and personal injury. See post, *Passage Money*, p. 36.

³ Thompson v. Reynolds, 7 E. & B. 162; 26 L. J. (Q. B.) 93.

would recover for any goods of his, not requiring a more specific designation, which ultimately proved to be on board at the time of the loss.¹

Hence it is laid down by the French jurists, and apparently on sound principles, that if, under such a general form of insurance, the ship, in the course of the voyage insured, and under liberty given her for that purpose in the policy, touches at an intermediate port, and there lands the goods which were on board at the commencement of the risk, and takes on board others on account of the assured, such substituted goods are comprehended under the general words of the policy, and their value is recoverable in case of loss.²

Substituted cargo.

So, in this country, although after a policy has been once effected on a particular subject of insurance, it cannot, in consequence of the stamp laws, be so altered as to apply to a totally different subject; "yet it is not to be inferred from hence," says Lord Ellenborough, "that shifting or successive cargoes on board the same ship, in the course of the same continued adventure, as in the African and other trades, out and home, may not properly be the subject of insurance under the word goods; for in some of these cases the successive cargoes, *i. e.* (1), of English goods; (2), African articles of traffic; and, lastly, West India produce, are, according to the course of such trading adventures, one continued subject-matter of insurance under the one name of *goods*."³

With regard to goods liable to leakage the French law requires them to be specifically described in the policy (except where the assured at the time of effecting the insurance is ignorant of the nature of the cargo), otherwise no loss is recoverable upon such goods under the general description. The same rule is extended to perishable articles and to contraband of war, by the laws of other foreign states.⁴

Goods subject to leakage, perishable articles, and contraband.

¹ Pour que telle assurance soit valable, il suffit que l'aliment du risque existe lors du sinistre. 1 Emerigon, c. x. s. 1, p. 296.

² Emerigon, *ibid.* See also 3 Boulay-Paty, Droit Com. Mar. 384;

Co. de Com., art. 335.

³ Hill v. Patten, 8 East, 373, 377. See also Tobin v. Harford, 32 L. J. (C. P.) 134; in error, 34 L. J. (C. P.) 37; 13 C. B., N. S. 791.

⁴ Ord. de la Marine, liv. 3, t. 6,

No such rule exists in this country. As to articles liable to leakage or deterioration, the underwriters by the common memorandum expressly exempt themselves either from all liability for average losses, or from liability for any such loss not amounting to a specified per-centage. As to contraband of war, although the underwriter would not be held liable unless he were told of the nature of the intended risk, it has never been decided that the contraband character of the cargo must be specified in the policy.

Bullion, coin, and jewels, on board for the purpose of commerce.

Considerable doubt appears at one time to have been entertained, in all probability from mistaken theories of the balance of trade, and of the evils of exportation of such commodities, whether money, bullion, or jewels, could be insured under the general denomination of "goods, wares, and merchandise." There is now, however, no doubt that, when put on board as merchandise, they may be insured, in this country, under the general description of goods and merchandise (though in actual practice they are generally insured under a specific description); it being at the same time understood that the underwriter is not liable for the risk of a clandestine exportation.¹ In some of the continental states there are positive regulations requiring these commodities to be specifically designated in the policy.² In France, the law is that they may be insured under the general designation, provided their transport be not prohibited and the bills of lading be duly made out.³

Bank notes and bills of exchange should, perhaps, be specifically described;⁴ for a policy "on goods" is held to be

art. 31; Co. de Com., art. 355; 1 Emerigon, c. x. s. 2, pp. 302—307. See the earlier ordinances of other States collected in the learned work of Magens, note *a* to s. 14, vol. i. p. 9; and the more modern ones in Nolte's edition of Benecke, vol. i. part ii. tit. iii. c. ii. pp. 549—552.

¹ For an instance see the case of *Da Costa v. Firth*, 4 Burr. 1966. "Goods, wares, and merchandise"

will cover dollars, if entered at the custom-house; per *Dampier, J.*, in *Manning's Dig. Index to N. P. Rep.* 165, note 5, 2nd ed.; see also 1 Magens, 10.

² See 1 Magens, 9, note; and 1 Nolte's Benecke, 556—558.

³ 1 Emerigon, c. x. s. 2, p. 303.

⁴ Per *Dampier, J.*, *Manning's Index*, 165; *Palmer v. Pratt*, 2 Bing. 185.

only on such goods as are merchantable (*merces*), *i.e.*, cargo put on board for the purposes of commerce.¹ Such a policy covers, however, an emigrant's equipment,² but not the ship's provisions³ or the captain's clothes, these latter being better described as master's effects.⁴

The master's clothes, and the ship's provisions.

"In merchandise," says Park, J., "is included all property of great value, unless attached to the persons of the passengers."⁵ Jewels, therefore, ornaments, cash, &c., not designed for trade, but carried about, or belonging to the persons of those on board, do not (as the better opinion seems to be) fall within the general description of goods and merchandise; and, in case of loss, would not be recoverable under a policy on goods in the general form.⁶

Money and jewels worn or carried about the person.

Goods carried on deck, as they are exposed to a greater hazard than goods carried in the ordinary way, are not covered by a general insurance in the common form on goods and merchandise;⁷ unless it be in virtue of a general custom of the particular trade, for then the underwriter is presumed to be acquainted with the custom and to have undertaken the additional risk. As it is only a certain description of goods in any trade that would be thus exposed, it may be doubtful whether, even where sanctioned by usage, the goods ought not to be specifically described in the policy so as to apprise the underwriter of the extra risk that he is to run. In the only case in which the point directly arose, the insurance was declared by the policy to be "on forty carboys of vitriol";⁸

Goods on deck not covered by general policy "on goods," unless there is a usage.

¹ So stated by underwriters in *Ross v. Thwaites*, before Lord Mansfield, 1 Park, Ins. 23, 24; and so defined by Best, C. J., in *Brown v. Stapylton*, 4 Bing. 121. "Wares or cargo for sale," per Lord Ellenborough in *Hill v. Patten*, 8 East, 374.

² *Wilkinson v. Hyde*, 3 C. B., N. S. 30; 27 L. J. (C. P.) 116; *Duff v. Mackenzie*, *infra*.

³ *Ross v. Thwaites*, 1 Park, Ins. 23. Provisions are included in the ship, *ante*, p. 20; *Stevens on Average*, 60. See *Brown v. Stapylton*,

4 Bing. 119; and the policy in *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J. (Q. B.) 147.

⁴ *Duff v. Mackenzie*, 3 C. B., N. S. 16; 26 L. J. (C. P.) 313.

⁵ 4 Bing. 122.

⁶ See 1 Park, Ins. 30; 1 Marshall, Ins. 327; 1 Emerigon, c. xii. s. 42, and c. x. s. 11.

⁷ *Backhouse v. Ripley*, and *Ross v. Thwaites*, 1 Park, Ins. 23, 24.

⁸ *Da Costa v. Edmunds*, 4 Camp. 142. So in the instance given by Mr. Phillips, in which an insurance on

Observations
of Lord
Lyndhurst.

and the observations of Lord Lyndhurst on this point are well deserving of attention. "Goods carried on deck," he says, "are not in the part of the ship where goods are usually carried; they are in more than usual peril, and a usage that they are not covered by an ordinary policy on goods, but that they require a distinct explanation to the underwriter, of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to the information which the underwriter ought to receive, to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts."¹

The general conclusion arrived at by Mr. Phillips is, that, if by the description of the voyage, or the character of the article specified in the policy, the underwriter may be presumed to have been apprized of a usage to carry it on deck, the policy will attach to it when so carried.² This appears very fairly to represent, if not the actual doctrine of the authorities, at all events the result of established principles.

The produce
of the whale
fishery is
covered by
goods or mer-
chandise.

In whaling voyages the only cargo, properly so called, on board the ship, from first to last, is in general the homeward cargo, consisting of the immediate produce and result of the fishing adventure; such proceeds, therefore (*i. e.*, the oil,

"outfits and catchings" was held to cover "blubber" remaining on deck, to be "tried" according to the usage of the whale fishery. Here, as Mr. Phillips remarks, "there is a uniform usage to carry on deck, and also an indication, by the description of the subject and the voyage, that the part of the subject in the form of 'blubber' is to be on deck;" ¹ Phillips, no. 460. In the two cases of *Gould v. Oliver*, 4 Bing. N. C. 134, and *Milward v. Hibbert*, 3 Q. B. 120, the point decided was, that goods carried on deck by the usage of trade are liable, if jettisoned, to contribute in general

average; but there is nothing in either case upon the point how far such goods are insurable under the general description. For timber on deck, unless the policy be "in and over all," the insurer is, by usage, not liable, *Miller v. Titherington*, 6 H. & N. 278; 30 L. J. (Ex.) 217.

¹ Per Lord Lyndhurst, C. B., in *Blackett v. Royal Exch. Ass. Co.*, 2 C. & J. 250.

² 1 Phillips, no. 460 *ad finem*. The foreign ordinances do not appear to furnish any explicit rules on this point; 1 Nolte's *Benেকে*, 553.

whalebone, &c., taken in the fishery), may be, and in practice generally are, covered under the general designation of "goods and merchandise."¹

Outfit in such voyages principally consists of the apparatus and instruments necessary for taking fish, seals, &c., and the disposing of them when taken, in such a manner as to bring home the oil, whalebone, and other animal produce of the adventure, with the greatest convenience and advantage; outfit, therefore, in such a voyage, cannot be considered as "goods," in any proper sense of that word; *i. e.*, as Lord Ellenborough defines it, "as part of the wares or cargo for sale laden on board the ship." It cannot therefore be recovered under a general policy on goods.²

Not so the outfit.

It has been held in the United States, that a general insurance on "cargo" will not cover provender taken on board for live stock, which constituted a great part of the cargo;³ nor will it cover the live stock itself.⁴ With regard to live stock, the rule seems to be the same in this country, such interest being always in fact described specifically. Thus, where a general policy *on goods* was intended to cover live stock, the insurance was declared, at the foot of the policy, "to be on thirty mules, ten asses, and thirty oxen," &c.;⁵ and in another case, where a policy was effected "on goods, as per annexed statement, valued at 2,800*l.*," the horses, a loss on which was claimed under this policy, were specially valued in the statement.⁶

Nor yet live stock or provender.

Although the interests and commodities already mentioned comprise the greater number of those which must be specifically designated in the policy, yet the almost invariable practice, whenever the cargo consists of few commodities, or

General practice to specify, when.

¹ *Hill v. Patten*, 8 East, 373, 375. So held also in the United States, in a case where the insurance was "on the cargo of a ship for a whaling voyage;" *Wolcott v. Eagle Ins. Co.*, 4 Pickering, 429.

² *Hill v. Patten*, 8 East, 373, 375, 376.

³ *Wolcott v. Eagle Ins. Co.*, 4 Pickering, 429; and see *Brown v. Stapylton*, 4 Bing. 119.

⁴ *Ibid.*

⁵ *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

⁶ *Gabay v. Lloyd*, 3 B. & C. 793.

where the goods are valued by the hogshhead, pipe, bale, &c., is to specify the commodities by name and number. This is generally done by writing at the foot or on the margin of the policy, "on woollen goods," "on piece goods," "on one hundred tierces of coffee," "on twenty hogshheads of sugar," adding also the mark of each bale, cask, &c.¹ This may be also done by altering the valuation clause so as to meet the views of the parties.

Caution as to specifying negligently.

Hats not covered by piece goods.

Nor a manufactured article by the separate ingredients of it.

Yet it must be carefully borne in mind, that whenever the goods are specifically described in the policy, if no property of the assured be on board which fairly answers the description, the policy will not attach.² If an insurance, for instance, be made on goods, described in the policy as *piece goods*, and by the invoice it appears that the goods really shipped were *hats*, the underwriter is not liable for loss on the hats.³ So, an insurance on tortoise-shell will not cover a loss on indigo,⁴ &c. If an insurance purports to be effected on several ingredients, described *nominatim* in the policy, which enter into the composition of a manufactured article, such policy will not cover a loss on the manufactured article itself, if that be a new product, and have a distinct appropriate name. Oil and barilla both enter into the composition of soap, yet an insurance on oil and barilla will not cover a loss on soap.⁵ It is said that an insurance on the raw material of a simple fabric, or utensil, into which no other ingredient enters, will cover a loss on such fabric or utensil: as, *e. g.*, an insurance on "gold" or "silver" covers the loss of a gold cup or of silver spoons;⁶ but it is doubtful whether the instance given be not of so exceptional a nature as to yield no general rule.

¹ De Symonds v. Shedden, 2 B. & P. 153.

² Si dans la police on avait spécifié la chose qu'on a voulu faire assurer, et qu'elle n'eût pas été chargée, l'assurance serait nulle, quoiqu'on en eût pour son compte d'autres marchandises abord; 1 Emerigon, v. x. s. 1, p. 293.

³ Hunter v. Prinsep, 10 East, 378; 1 Marshall, Ins. 323.

⁴ 1 Emerigon, c. x. s. 1, p. 294.

⁵ 1 Emerigon, c. x. s. 3, p. 306.

⁶ Ibid. I suspect that this is a solitary instance of a peculiar *usus loquendi* as to the precious metals, and that it will not bear to be extended.

The next subject demanding our attention is Freight. Freight. According to the general law of shipping, freight, as between the shipowner and the shipper, is, strictly speaking, the price to be paid by the latter to the former for the carriage of goods by ship, and is not earned or payable till the arrival and delivery of the goods at their port of destination.¹

In the law of marine insurance it has a far wider signifi- Meaning of,
in marine
insurance. cation, comprising all that is implied in "the benefit derived by the shipowner from the employment of his ship."² In this sense, therefore, it includes not only freight properly so called as above defined, but likewise that which is often called freight, being the chartered hire of the ship or part of her,³ and also, thirdly, the benefit accruing to the shipowner from the carriage of his goods by his own ship in the shape of their increased value to him at the port of delivery.⁴ As Lord Tenterden observes, "If the term freight, as used in policies of insurance, imports the benefit derived from the employment of the ship, it is the same thing to the shipowner whether he receives that benefit of the use of his ship (1st), by a money payment from one person, who charters the whole ship; or (2nd), from various persons who put specific quantities of goods on board; or (3rd), from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship."⁵

In whichever of these three senses the word is used, it is Expected
freight is a
lawful subject
of insurance
in this
country. a clearly-established principle in this country, that expected freight is a lawful subject of marine insurance. "It would, indeed, be extraordinary," says Chambre, J., in the case of *Lucena v. Craufurd*, "if freight could not be made the subject of protection by an instrument, which had its origin in

¹ MacLachlan on Shipping, c. x. p. 452.

Lord Ellenborough in *Forbes v. Aspinall*, 13 East, 323, 325.

² Per Lord Tenterden in *Flint v. Flemyng*, 1 B. & Ad. 45, 48.

⁴ *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N.C. 519.

³ Per Lord Tenterden in *Winter v. Haldimand*, 2 B. & Ad. 649; per

⁵ 1 B. & Ad. 48.

commerce, and was introduced for the very purpose of giving security to mercantile transactions; it is a solid substantial interest ascertained by contract, and arising out of labour and capital employed for the purposes of commerce.”¹

Inchoate right
to freight.

We shall see more at large hereafter, when considering who may be a party to a policy, that the assured on freight must have an inchoate right to it, in order to entitle him so to insure; in other words, he must be in such a position with regard to the expected freight, that nothing could prevent him from ultimately having a perfect right to it but the intervention of the perils insured against.

When freight is the price to be paid for the hire of the ship under a charter-party, the shipowner has this inchoate right directly there is an inception of performance by the ship under the charter-party.² When it is the price to be paid for the carriage of goods in the ship, then this inchoate right accrues directly the goods of the merchant are actually put on board, or are even contracted for and ready to be put on board, and the ship is ready to receive them. In either case the shipowner has put himself in a condition to earn freight, and he will earn it provided either the ship, which he has thus let out to the freighter, or the goods, which he has thus engaged to transport for the merchant, arrive safely at their destination. If, by the perils of the sea, they are prevented from thus arriving, the shipowner has no claim to freight from the merchant—in other words, he is prevented, in that case, by the perils of the sea, from realising that which, but for the intervention of those perils, he would certainly have earned. It is but fair and reasonable, therefore, that he should have the means of protecting himself, by a policy of marine insurance, against the loss he is thus exposed to.

Such are the general principles upon which, in this country, in America, and in many of the continental states, the

¹ 3 B. & P. 102.

² *Foley v. United F. & M. Ins. Co. of Sydney*, L. R., 5 C. P. 155;

Barber v. Fleming, L. R., 5 Q. B. 59; *Thompson v. Taylor*, 6 T. R. 478.

shipowner is allowed to effect an insurance on that freight which he expects to earn, and which he is only prevented from earning by the perils insured against.

But the French Legislature, proceeding rather on scholastic French law. refinements than mercantile considerations, have prohibited all insurance of expected or future freight,¹ on the ground that expected freight is a mere contingency in which there is no present existing interest; that it is but a gain which the assured may miss making, not a property which he can risk losing. But, although the prohibition is absolute against the insurance of expected freight (*fret à faire*), yet the French Legislature permits the insurance of freight actually earned (*fret acquis*). The French jurists have refined much in explaining the meaning of this term; but, upon the whole, by *fret acquis* may, it seems, be understood, either freight paid in advance and not reimbursable; or freight which, by the terms of the charter-party, is payable in all events. The French Courts are acute in distinguishing freight paid in advance from advances made on freight and repayable, never allowing the latter to be the subject of a valid policy of insurance; and yet the former, which has the sanction of law, is a mere shift for evading it, the shipowner paying the premium on the policy, which the freighter takes out in his own name.² The term appears also to extend to freight actually earned by the unloading of a portion of the cargo at a port of delivery short of the port of ultimate destination.³ By

¹ "Fret à faire," Ord. de la Marine, liv. 3, tit. vi. art. 15. "Fret des marchandises existant à bord," Co. de Com., art 347.

² Weil, Des Assur. Maritimes, nos. 92, 93, 94.

³ Ord. de la Marine, liv. 3, tit. vi. art. 15, and Valin's Comment. *ibid.*; Co. de Com., art. 347; Pothier, d'Assur. no. 36, and the notes of M. Estrangin at pp. 52—55 of his edition; 1 Emerigon, c. viii. s. 8, pp. 227—234; 3 Boulay-Paty, Droit Mar. 481—487; 3 Pardessus, Droit

Com. 269, 270. When the clauses of the Code de Commerce were under discussion in the legislative council, the superior advantages of the English system as to insuring freight were strenuously, but without effect, pressed on the attention of the government by the chambers of commerce of Nantes and Bordeaux, and even by the members of the Cour de Cassation; see Boulay-Paty, Comment. on Emerigon, vol. i. pp. 234, 235.

A *projet de loi* for the repeal of this

the new Italian Code, a policy on the freight of goods on board is void.¹

Advances on freight.

There can be no doubt that sums paid by the charterer or his agent, as an advance of part of the freight, are also insurable by him in this country. The only question is, whether he can insure them under the general term freight, or must describe them specifically in the policy; and this depends, as we shall see hereafter, on the particular terms of the charter-party.²

Freight for part of the voyage, or time.

It was laid down by Lord Kenyon, at *Nisi Prius*, that freight could not be insured for part of the intended voyage;³ but this position, unjustified by principle, was subsequently overruled by Lord Ellenborough and the Court of King's Bench, and it is now quite clear that freight, like any other subject, may be insured either for part or the whole of the voyage or of the time over which it is likely to extend.⁴

What is covered by policy on freight.

Freight must be insured *co nomine* in the policy, either by inserting the words *on freight* in the margin, or appending them at the foot of the instrument. Such a policy would cover not only freight in its strictest acceptation, but the chartered hire of the vessel,⁵ the increased value to the owner from carriage of his goods in his own ship,⁶ and we have

prohibition of insurance of freight *à faire* was again the subject of consideration with the Senate in 1876, M. Grivart reporting in its favour, but again the old law was affirmed without modification. Journ. Off. du 28 Decembre; Weil, Des Assur. Marit. no. 91.

¹ Co. di Commercio, art. 461.

² See next Chapter, and the discussion in *Allison v. Bristol Mar. Ins. Co.*, 1 App. Cases, 209; *De Silvale v. Kendall*, 4 M. & Sel. 37; *Manfield v. Maitland*, 4 B. & Ald. 582; *Winter v. Haldimand*, 2 B. & Ad. 649; *Wilson v. Martin*, 11 Exch. 684; *Hicks v. Shield*, 7 E. & B. 633; 26 L. J. (Q. B.) 205; *Williams v. North*

China Ins. Co., 35 L. T., N. S. 884; *Maclachlan, Shipping*, 519, 520.

³ *Murdock v. Potts*, A.D. 1795; see 1 Marshall, Ins. 332; 2 Park, Ins. 634.

⁴ *Taylor v. Wilson*, 15 East, 324; *Hall v. Brown*, 2 Dow's P. C. 367; *Michael v. Gillespy*, 26 L. J. (C. P.) 306; 12 C. B., N. S. 627.

⁵ *Etches v. Aldan*, 1 Man. & Ry. 157; *S. P.*, *Clark v. Ocean Ins. Co.*, 16 Pickering's R. 289.

⁶ *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N. C. 519. See per curiam, *Miller v. Woodfall*, 8 E. & B. 493; 27 L. J. (Q. B.) 120.

very little doubt payments made in advance on account of either the first or the second of these classes of freight.¹ Certain expressions attributed to Lord Tenterden in the report of *Winter v. Haldimand* respecting advances on account of chartered hire, as though a more specific description were necessary in a policy intended to cover them, must be understood, in accordance with the general principle of insurance law respecting freight laid down by him in a previous case,² as indicating rather what description would have served the purpose of the assured under the circumstances before him, than anything that was indispensably requisite.³

Whether a charterer who hires a vessel for a voyage at a certain rate per month, payable on completion of the voyage, can insure the freight payable to himself for the use of the ship in carrying the goods of other persons, under a general policy on freight;⁴ and whether such a policy will cover the interest of a party who has sold his vessel, reserving to himself a right to receive the freight for the voyage insured,⁵ has been doubted in the United States. But neither in that country nor in this have such doubts prevailed against the opinion that such persons have an interest which may be covered by a valid policy on freight.

As to the charterer who carries goods on freight, or the owner, who sells his ship, reserving the freight.

In some respects similar to freight, in others very different, is our next subject of insurance, Passage Money. It is not insurable as *freight*, for there is no usage in insurance law in this country so to designate passage money. In the absence therefore of anything on the face of the policy to show that passage money is intended by or to be included under "*freight*," this latter term, if there is any freight properly

Passage Money.

¹ See *Allison v. Bristol Mar. Ins. Co.*, 1 App. Cases, 209; *Wilson v. Martin*, 11 Exch. 684, and cases supra, p. 34, note 2; and *Hall v. Janson*, 4 E. & B. 500.

³ *Winter v. Haldimand*, 2 B. & Ad. 649, 654, 658.

⁴ *Riley v. Delafield*, 7 Johns. 522; cited 1 Phillips, no. 480.

⁵ *Mellen v. Natchez Ins. Co.*, 1 Hall, 452.

² *Flint v. Flemmyng*, 1 B. & Ad. 48.

so called to which the policy may apply, will be confined to that.¹ It differs from freight in point of practice if not of principle, by a very important usage that requires it to be paid before sailing.² Yet "no liability is by the common law thrown upon the owner or master of a ship, if the ship be lost, to forward passengers to their place of destination. Nor usually is there any obligation to do this imposed by the actual contract between the parties."³ The passenger in these circumstances when he has paid his passage money has an insurable interest analogous to that of the merchant upon freight paid in advance.

Statutory
liabilities.

The Passenger Act, 1855 (18 & 19 Vict. c. 119),⁴ in great measure superseding the common law on the points referred to, without taking away any common law rights previously possessed by the passenger,⁵ imposes certain liabilities on the owners and masters of passenger ships, in virtue of which they are so far insurers that, notwithstanding the wreck or loss of the ship, the surviving passengers must be forwarded by them to their place of destination. The statute then proceeds to countervail these novel obligations by enabling the persons subjected to them to cover these statutory risks by a policy of insurance.⁶

Under a policy against all costs, charges and liabilities to which the owner or charterer might be subjected under sections 46, 47, 48, 49, 50 and 51 of the (now repealed Passengers Act) 15 & 16 Vict. c. 44, the owner recovered against the underwriter for money expended in forwarding the passengers to their ultimate port from New Providence, off which place the vessel in the course of her voyage had been totally lost.⁷ A year after, under another policy "on

¹ *Denoon v. Home and Colonial Ass. Co.*, L. R., 7 C. P. 341.

² See *MacLachlan on Shipping*, c. vii. *Passengers*. The 18 & 19 Vict. c. 119 is amended by the 26 & 27 Vict. c. 51; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 85; 38 & 39 Vict. d. 66; and 39 & 40 Vict. c. 80.

³ Per Lord Campbell, C. J., in *Gibson v. Bradford*, 3 E. & B. 516; 24 L. J. (Q. B.) 159, 160.

⁴ This statute is amended by 26 & 27 Vict. c. 51.

⁵ 18 & 19 Vict. c. 119, s. 58.

⁶ *Ibid.* s. 55.

⁷ *Gibson v. Bradford*, 3 E. & B. 516; 24 L. J. (Q. B.) 159.

passage money of emigrants, to pay a loss *pro rata* subject to (the same clauses almost as in the foregoing case) and against these risks only," the owner sought to recover the money spent in provisions for the emigrants during six weeks' stay at Fayal whilst the ship was being repaired after sea damage, and failed in his suit simply because his obligation to maintain the passengers during the detention was imposed by a section not included in the policy.¹

We come now to deal with Profits and Commission as subjects of marine insurance. Profits and Commission.

The same reasons which led to the prohibition of insurance in France on freight, have led to the prohibition of insurance there on expected profits.² Profits.

In Germany, in Holland, in Sweden, in Portugal, and in the United States, as in this country, insurances on expected profits are lawful.³ The grounds on which they are so considered are expressed with admirable force and clearness in the following passage from the judgment of Lawrence, J., in the case of *Barclay v. Cousins*. "As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every

¹ *Willis v. Cooke*, 25 L. J. (Q. B.) 16; 5 E. & B. 641.

² See 1 Emerigon, c. viii. s. 9, pp. 236—239, with the commentary of Boulay-Paty. See also Ord. de la Marine, liv. 3, t. 6, art. 15; Code de Commerce, art. 347. Spain and Denmark follow the French code in this prohibition.

³ In Holland, insurance on profits has long been practised, and is now permitted by law, on condition that the expected profits are separately valued in the policy and the goods

specified out of which they are to be derived; 1 Nolte's Benecke, 301, 302. In Wendt's translation of the German Code, arts. 783, 805, 806, both profits and commission are declared to be insurable, but, what is odd, is that the word *imaginary* is annexed to each as the subject of the policy. By the Italian Codice di Commercio, art. 461, a policy on expected profits is void. See the modern European laws collected by Nolte in his edition of Benecke, vol. i. 298—312.

maritime adventure, the adventurer is liable to be deprived, not only of the things immediately subjected to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. If they do not arrive, his loss is not merely that of his goods, but of the benefits which he might obtain, were his money employed in an undertaking not subject to the perils. If it be allowable for the merchant to protect capital, subject to the risk of maritime commerce, by insuring it, why may he not protect those advantages he is in danger of losing by their being exposed to the same risks? It is surely not an improper encouragement of trade to provide, that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that the principal should not, in consequence of such bad fortune, be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce, by their having the means of preserving their capitals entire."¹

What entitlements assured to recover.

Such are the principles upon which insurances on expected profits are allowed in this country. Profits may be insured equally by valued and by open policies.² But, whether insured by one or the other, it is the law of this country (as we shall see more at large when treating of the insurable interest of the parties), that the assured cannot recover unless he prove that, but for the intervention of the perils insured against, some profit would in fact have been realized by the sale of his goods on arrival.³ He must also prove that the goods, from the sale of which the profits were expected, have, at one time or other, during the period covered by the policy, been actually exposed to the perils insured against,⁴

¹ Per Lawrence, J., *Barclay v. Cousins*, 2 East, 544.

² *Eyre v. Glover*, 3 Camp. 276.

³ *Hodgson v. Glover*, 6 East, 316. The law is different in the United States; see *Patapsco Ins. Co. v. Coulter*, 3 Peter's Supreme Court Rep. 222; 1 Phillips, Ins. no. 318. It is

there a conclusive presumption that some profit would have accrued, had the goods arrived, and upon this the valuation in the policy attaches; 1 Parsons, Ins. 195.

⁴ *McSwiney v. Royal Exch. Ass. Comp.* 14 Q. B. 634; *S. C.*, in error, *ibid.* 646; *Halhead v. Young*, 6 E. &

and also, that he was legally interested in them at the time of the loss.¹ "The foundation of the insurance is not a bare expectation of interest in a subject with which, at the time of effecting the insurance, the assured was not connected, but an expectation of profits on goods, at that time his."²

A party may also insure the sums which he is to receive Commissions. by way of commission on the sale of merchandise; and if the merchandise, on which the commissions were to arise, was only prevented from arriving by the perils insured against, the assured may recover to the extent of his loss,³ provided it appear that the goods were actually on board at the time of the loss.⁴

Profits or commissions are not covered by a policy on *goods or merchandise*; they must be specifically named.⁵ This Must be specifically named. rule is absolute in England. In the United States it appears to have been held, that "a right to a certain percentage, proportion or share of a cargo as commissions on profits, is covered by a policy on 'property.'"⁶

Lloyd's form of policy is adapted as usual by insertion of the word *profits* or *commissions* in the margin; or in the valuation clause, adopting or adapting the language of the

B. 312; 25 L. J. (Q. B.) 290. In this latter case an attempt was made by parol evidence to set up a different risk from that which was expressed in the policy, but it failed.

¹ Stockdale v. Dunlop, 6 M. & W. 224.

² Lucena v. Craufurd, 3 B. & P. 85; per Blackburn, J., in Anderson v. Morrice, L. R., 10 C. P. 621. Nolte adopts this view; Nolte's Benecke, vol. i. p. 310.

³ Flint v. Le Mesurier, before Lord Kenyon, 2 Park, Ins. 563; Barclay v. Cousins, 2 East, 544; King v.

Glover, 2 B. & P. N. R. 206. Insurance on commissions is practised at Hamburg; and see generally for the foreign law on this subject of insurance, 1 Nolte's Benecke, 311, 312.

⁴ Knox v. Wood, 2 Park, Ins. 563; S. C., 1 Camp. 543.

⁵ So resolved by all the judges in Lucena v. Craufurd (in Dom. Proc.), 2 B. & P. N. R. 315; Anderson v. Morrice, L. R., 10 C. P. 609, 622, 624.

⁶ Holbrook v. Brown, 2 Mass. R. 280; 1 Phillips, Ins., no. 462.

clause, according as the subject of the policy is valued or not.¹

Bottomry and
Respondentia.

Loans on Bottomry and Respondentia, though themselves a species of insurance, may yet be the subjects of insurance, inasmuch as they are an interest exposed to risk from the perils of the sea.²

Who may be
assured.

The lender only, as appears by the nature of the contract, can insure the sum advanced. The condition of a bottomry bond is, that if the ship perishes the borrower pays him nothing; if it arrives safely, or perishes during or after deviation, or is sold or broken up at an intermediate port, he pays the capital and the maritime interest; the lender's capital and interest, therefore, being exposed to risk are consequently insurable.³ It is otherwise if the terms of the loan make the money repayable in any event; it is not insurable, since there is no sea risk; but in that case it never was bottomry.⁴

The borrower clearly cannot insure the sum advanced, for the risk is upon the lender and not upon him; and as in case of loss he has nothing to pay, were he to receive the whole sum from the underwriters he would have a direct interest in the destruction of the vessel.⁵ Of course, if the interest of the assured in the adventure exceeds the sum borrowed on bottomry, he may insure this surplus, though not as bottomry.⁶

The law of
France.

Agreeably to the principles which guide them in the case of future freight and expected profit, the French writers and

¹ See *Eyre v. Glover*, 16 East, 218.

² 1 Emerigon, c. viii. s. 11, p. 241; Pothier, d'Assur. nos. 30, 31; *Glover v. Black*, 3 Burr. 1394; 1 W. Bl. 405.

³ 1 Emerigon, c. viii. s. 11, p. 243; 1 Nolte's Benecke, 295, 296.

⁴ *Stainbank v. Fenning*, 11 C. B.

51; *Stainbank v. Shepard*, 13 C. B. 418; and see *Simonds v. Hodgson*, 6 Bing. 114; *S. C.* in error, 3 B. & Ad. 50.

⁵ Pothier, d'Assur. nos. 31, 32.

⁶ Valin, Comment. Ord., liv. 3, t. 6, art. 16; Pothier, no. 31; 1 Emerigon, c. viii. s. 11; *Glover v. Black*, 3 Burr. 1394; 1 W. Bl. 405.

the French Legislature¹ declare that though the capital lent on bottomry may be insured, yet the maritime interest, which the lender on bottomry is to receive on the prosperous termination of the voyage, cannot; because, as Pothier expresses it, such interest is a gain, which the lender will miss making if the ship perishes, and not a loss by the perils of the sea.²

In this country, and also in the United States, a more liberal practice has prevailed, and bottomry or respondentia interest may be the subject of insurance.

In this country and United States.

Respondentia and bottomry loans are not covered under the general denomination of goods and merchandise; they must be specifically named.³ Lord Mansfield put this on the ground "that by the custom of merchants, respondentia is insured under a special denomination:" but Kent, J., has also suggested, as a reason for the rule, "that the risk is peculiar, as there is neither average nor salvage; and a capture does not mean a temporary taking only, but one that occasions a total loss."⁴

Must be specifically named in the policy.

Yet if it can be shown to be the usage in any particular trade to insure these interests under general words, they may be recovered under a policy containing such words only. On the ground of such a custom in the East India trade, a captain was permitted to recover, at respondentia interest, money he had laid out for the use of the ship, under the general words "goods, specie, and effects on board."⁵

Unless there be usage to the contrary.

Of course, if the instrument of hypothecation be not in law what it is described in the policy to be, the policy is invalid. The Court of Common Pleas, therefore, upon the

The specific description should be true in fact and law.

¹ Ord. de la Mar., liv. 3, t. 6, art. 17; Co. de Com., art. 347; Pothier, d'Assur. no. 32; 1 Emerigon, c. viii. s. 11, p. 243.

² Pothier, d'Assur. no. 32. By the German Code, art. 807, both the moneys advanced on bottomry and the bottomry premium may be insured. By the Italian Cod. di Com., art. 461, a policy on money taken

up on bottomry or the maritime interest is void.

³ Glover v. Black, 3 Burr. 1394; 1 W. Bl. 399, 405, 422; Simonds v. Hodgson, 3 B. & Ad. 50.

⁴ Robertson v. Unit. Ins. Co., 2 Johnson's Cases, 250; 1 Phillips Ins. no. 427.

⁵ Gregory v. Christie, 3 Dougl. 419; 1 Marshall, Ins. 326.

construction of such an instrument being of opinion that it was not in law a bottomry bond, because it made the lender's claim under it depend, not on the arrival of the ship, but on the arrival of the master, held, that the lender could not recover under a policy "on bottomry."¹ The Court of King's Bench, sitting in appeal, admitted that, had the Court of Common Pleas been correct in their construction of the instrument, the policy as framed would not have covered the interest of the lenders.² Accordingly, where the money borrowed was secured by bills on the owner, and by an instrument which purported to be a hypothecation of ship, cargo, and freight, but in effect was an unauthorized mortgage of these interests, the Court held, that the lender had no insurable interest in the ship.³

Seamen's
Wages and
Effects.¹

We have reserved for notice in this place a subject that has hitherto been debarred the protection of insurance, by the maritime law, probably, of Europe. Seamen are allowed to insure goods purchased with their wages, and put on board as merchandise; but their wages by our law are not insurable,⁴ unless a change of policy involving this subject be understood to have been introduced by the Merchant Shipping Act, 1854. Freight, for the first time in the history of English maritime law, ceased by that statute⁵ to be the mother of wages.⁶ The loss or wreck of the ship in the course of the voyage, no longer necessarily carries with it the loss of wages already earned by the seamen; but it still necessarily involves the loss of future wages for the same

—are they
insurable?

¹ *Simonds v. Hodgson*, 6 Bing. 114.

² See remarks of Lord Tenterden in reversing the judgment of the Court of C. P. in *Simonds v. Hodgson*, 3 B. & Ad. 57.

³ *Stainbank v. Fenning*, 11 C. B. 57; *Stainbank v. Shepard*, 13 C. B. 418.

⁴ *Webster v. De Tastet*, 7 T. R. 157; *The Lady Durham*, Stuart, 3 Hagg. Ad. 196, 201; *The Neptune*, Clark, 1 Hagg. Ad. 227, 232, 239; 1 Emerig. c. viii. s. 10, p. 235, and the learning there collected on the point. So in the United States, *Galloway v. Morris*, 3 Yeates, R. 445.

⁵ 17 & 18 Vict. c. 104, s. 183.

⁶ *The Neptune*, Clark, ubi sup.

voyage,¹ and probably of all the effects on board belonging to the crew. It seems never to have occurred to any one that these effects of the common seamen are insurable, probably on the same ground of policy (for it is not principle) that declared the wages uninsurable. What that policy was, is thus expressed by Lord Stowell: "The rule that makes the payment of wages dependent on freight, is an additional security to the safety of ship and cargo; and, as the Lord Chief Justice Abbott expresses it in his excellent publication (on 'Shipping,' p. 435, 3rd ed.), was framed in order to stimulate the zeal and attention of this class of persons engaged in very perilous service." The noble and learned Judge bows to the rule, and labours to obviate some of the hard consequences of it on the seamen, by preserving, at all events, his lien on the wreck, notwithstanding the absence of freight earned. He concludes a remarkable judgment in favour of such a lien with this remarkable passage: "Be it remembered, that by the general and just policy of all maritime states, the total loss of the ship, occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavours to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, as his owner is empowered to do for his, it is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved as far as they will go, in satisfaction of his wages already earned by past services and perils."²

Sir John Nicolls was subsequently obliged to decide against a claim for seaman's wages out of the owner's insurance on the lost vessel. "A seaman," he says, in the course of the judgment, "generally knows whether the ship be insured or not, and if such an insurance could enure to his

¹ MacLachlan on Shipping, 228.

² The Neptune, Clark, 1 Hag. 239.

advantage, it might make him indifferent, and moderate, if not extinguish, all exertion on his part."¹

The sole ground on which these learned Judges so reluctantly proceeded against the seamen has been removed.² On the same ground, Lord Stowell, at least, seems to place the prohibition against the insurance of seamen's wages.³ As far as we can perceive, it rests on no other; except, indeed, it be in France; but there they prohibit the insurance of profits, for the same reason which is offered as the only additional ground for the rule touching wages.⁴

Why not?

Are a seaman's wages now insurable? The old law barred all claim to wages against the owner in case of intermediate loss of the ship, and the conventional doctrine of their non-insurability followed from this as a consequence simply. The repeal of the rule then ought to carry with it the consequence. If now the seaman's title, under the new law, to wages up to the time of the loss, operates no prejudice to the ship while she exists, it is not likely to be a whit more prejudicial to the owners' interests, when the ship no longer exists, for the seaman to have a claim against the underwriter to wages for the remainder of the voyage. The master always might insure his wages; but, until the Act of 1854 gave it him, he had no lien for them on either ship or freight; the loss of either or both did not entail on him the loss of his wages. Now, however, that he is in the same position as the seaman in respect of lien, it is still the received doctrine that his wages are insurable. Then, why not the seaman's? But there is no decision to this effect since 1854, and no decision, we believe, to the contrary; although there is a notion in the profession that these wages are not insurable.⁵

¹ The *Lady Durham*, Stuart, 3 Hagg. 196, 201.

² 17 & 18 Vict. c. 104, s. 183.

³ In the language cited above; *The Neptune*, Clark, 1 Hagg. 239.

⁴ 1 Emerig. 236—239.

⁵ I think the right of seamen to insure their wages and effects, and the encouragement of the practice by facilities being offered them for so doing, would improve the character and habits of seafaring men, and

All this applies to the wages of the crew, and of all the officers under the master.¹ The master is an exception. He may insure his wages, his personal effects on board, his commissions, and his share of the ship or cargo.²

The master's wages insurable.

No insurance, however, can be effected on money advanced to the captain by the agent of the shipper in the course of the voyage, on his personal account;³ and a policy on money lent to the captain, payable out of the freight, was held void.⁴

Advances to the captain on his personal account.

There is sometimes a difficulty in accurately describing the subject of insurance; substantial accuracy, however, will always suffice, and so much, at least, is indispensable in every case in which a specific description is required. In the following case of *Palmer v. Pratt*, we do not think that more than this was exacted.

Miscellaneous

In that case the policy was effected "upon any kind of goods and merchandise," &c., in the common printed form, for a voyage from London to Calcutta, and the insurance, by a memorandum on the face of the policy, was declared to be "on two bills of exchange;" as, however, it appeared that the supposed bills were drawn on a contingency, being made payable at thirty days after the ship's arrival at Calcutta, the Court held, that such instruments, being mere waste paper, were improperly described as bills of exchange, and that, on this ground, their nominal value, in case of loss, could not be recovered under such a policy.⁵

Policy on "bills of exchange" will not cover instruments not legally bills.

would increase the security of the lives and property placed in their power. The above section stands for the most part as it did in the 3rd ed. of this treatise, into which I introduced it with the concurrence of some large shipowners in the north of England, in the hope of drawing public attention to the subject.—Ed.

¹ *Webster v. De Taftet*, 7 T. R. 157.

² *Duff v. Mackenzie*, 3 C. B., N. S. 16; 26 L. J. (C. P.) 313; *Hawkins v. Twizell*, 5 E. & B. 883; 25 L. J. (Q. B.) 160; *King v. Glover*, 2 B. & P. N. R. 206; *King v. Walker*, 33 L. J. (Ex.), in error, 325.

³ *Siffken v. Allnutt*, 1 M. & Sel. 39.

⁴ *Wilson v. Royal Exch. Ass. Co.*, 2 Camp. 624.

⁵ *Palmer v. Pratt*, 2 Bing. 185 :

What is covered by "specie and returns."

The ship *Leonidas* was chartered for a voyage from Buenos Ayres to Canton and back, at a gross sum payable, not as freight, properly so called, but as the hire of the ship for the voyage. Part of the sum was paid, as stipulated by the charter-party, by the charterers' agents at Canton, to cover the port charges and other incidental expenses of the ship there. The charterers, who had shipped on board the vessel at Buenos Ayres a large sum in dollars to be invested in produce at Canton, being desirous of securing their interest in the adventure, caused a policy to be effected, in the common form, for the proposed voyage, "on specie, &c., shipped on board *The Leonidas* in the river Plate, and on the same or the returns thereof, as interest might appear, in any description of merchandise," &c. Lord Tenterden held, that under a policy so framed the assured could not recover, in addition to what is usually recoverable as the value of goods in an open policy, the sum paid for port charges &c., at Canton.¹ His Lordship, however, in the course of the argument, intimated that, although such sum could not be recovered under a mere policy on merchandise, yet it might have been insured as money paid for shipment of goods to be transported to Buenos Ayres;² and, in delivering the judgment of the Court, he said, "We have no doubt that these payments might have been made the subject of a special and distinct insurance."³

Share in company uninsurable.

A shareholder in the Atlantic Telegraph Company, before any attempt had been made to lay the cable between the Irish and American coasts, effected a policy to secure himself against loss when the attempt was made; and in the valuation clause (the policy being in the form usual at Lloyd's) occurred the only specification of the subject of insurance in these words: "The said ship, &c., goods and merchandise, &c. * * * are, and shall be, valued as on one 1000*l.* share in

See *Stainbank v. Fenning*, 11 C. B. 57; *Stainbank v. Shepard*, 13 C. B. 418.

¹ *Winter v. Haldimand*, 2 B. & Ad. 649.

² *Ibid.* 654.

³ *Ibid.* 658.

the Atlantic Telegraph Company, said share valued at 1100%.” Stopping here, the policy would have been construed as being on a subject—a share in a company—incapable of exposure to sea perils, and consequently invalid. But this other sentence followed: “In case of loss, the part saved to be sold or appraised for the benefit of the underwriters.” The Court regarding the whole in the light of these latter words, held that it was a policy on the cable, and that the assured under the circumstances was entitled to recover for an average loss if above 3 per cent.¹

As shares in an incorporated company cannot be exposed to maritime perils, they consequently cannot be the subject of marine insurance; and as the shareholder in such a company has no property in the estate or chattels of the company, such a chattel as the Atlantic Cable, though exposed to maritime perils, cannot for him be the subject of a valid policy. But it has been held that his right to a share of the profits of such a company gives him an insurable interest in an adventure, such as that of laying the Atlantic Cable, which interest, by the use of suitable language, may be covered by a policy of insurance.

In *Wilson v. Jones*,² a shareholder in the Atlantic Telegraph Company, before the cable had been laid, effected a policy to cover his interest in the concern, describing the subject of insurance in a cloud of ambiguous words, as follows:—“The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers, on this policy, are and shall be valued at 200% on the Atlantic Cable, value say on twenty shares, valued at 10% per share.” Then on the margin over against the statement of perils insured against, were written these words: “It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified,

¹ *Paterson v. Harris*, 1 B. & S. 336; 30 L. J. (Q. B.) 354. There was no plea on the record to the in-

surable interest of the claimant.
* L. R., 1 Exch. 193; in error, 2 Exch. 139.

shall cover every risk and contingency attending the conveyance and successful laying of the cable." Having regard to these latter words, both the Court of Exchequer and the Court of Exchequer Chamber held that the subject intended to be insured was the plaintiff's interest in the adventure, and that this might be the subject of a valid policy of marine insurance.¹

Surplus provisions.

Suppose the provisions of a ship for her ordinary crew to be laid in double, for reasons either of economy or necessity, and a total loss of ship and provisions soon after starting on her outward voyage,—are the underwriters liable, under a policy on ship, for the whole of the provisions also? Provisions for the voyage insured are covered by a policy on ship,—that we have already seen;² they are part of the instrumental means of earning the pending freight, which, in case of abandonment, falls to the underwriter on ship.³ That ground, however, will not bear a claim for provisions which are greatly superfluous for the voyage in the policy. The provisions in excess are cargo, which the underwriter on ship has therefore nothing to do with.

Provisions and provender.

The same line of demarkation excludes provisions for passengers from the protection of a policy on ship only, notwithstanding they are incidental to the earning of passage money. Yet, as even live stock cannot be insured as cargo, nor the provender necessary for it,⁴ the more proper course appears to be to insure provisions for passengers and provender for live stock *eo nomine*.

Premiums.

We shall see, when we come to consider the mode of valuing cargo for the purposes of insurance, that premiums form a proper item of the insured value of the subject of the policy.⁵

¹ Reference was made by Blackburn, J., to the language of Lawrence, J., in *Bardley v. Cousins*, 2 East, 544; and in *Lucena v. Craufurd*, 2 B. & P. N. R. 301.

² Ante, p. 20.

³ See 1 Emerigon, c. viii. s. 6; *Davidson v. Case*, 5 M. & Sel. 79.

⁴ Ante, p. 29.

⁵ Post, Part I. c. vi.; *Glaser v. Cowie*, 1 M. & Sel. 52.

“Although the subject-matter of the insurance,” says Lord Tenterden,¹ “must be properly described, the nature of the interest may in general be left at large.” “But in all cases where the peculiar nature of the interest alters the risk,” says Blackburn, J.,² “it may be properly said that such interest is the subject-matter of the insurance; at all events, there is great force in the argument that the nature of the interest should be stated in the policy.”

As to the nature and extent of the interest.

In a case of capture during hostilities with this country, Prize. where ship and freight were vested in the Crown, and the captors had no interest in either, nor other concern in respect of the same beyond a mere chance that the King might be induced to give them something out of the produce of either or both, Lord Ellenborough says, “Supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety?”³

In *McSwiney v. Royal Exchange Assurance Co.*, the Profits. plaintiff had purchased, at 19s. a cwt., 6000 bags of rice, to be shipped at Madras on board the *Edward Bilton*, to arrive in this country on or before the end of May; he had sold the same at 20s. 6d. a cwt. upon the other terms of his own contract of purchase; and he insured his interest by a policy at and from Madras to London *on profits on rice*, laden or to be laden on board the *Edward Bilton*, beginning the adventure from and immediately after the loading

¹ In *Crowley v. Cohen*, 3 B. & Ad. 478, 485.

² In *Mackenzie v. Whitworth*, on appeal, 1 Ex. Div. 36, 42.

³ In *Routh v. Thompson*, 11 East, 428, 433. This was the termination

of a *lis pendens*, which began as *Craufurd v. Hunter*, 8 Term R. 13, and re-appeared as *Lucena v. Craufurd*, 3 B. & P. 75; *S. C.*, 2 B. & P. N. R. 269.

thereof aboard the said ship at Madras. It happened that when 1200 of the bags had been laden on board the *Edward Bilton*, she was wrecked by a storm; the 1200 bags, damaged by sea water, were put ashore and sold on the spot, and the vessel was unfit to receive the remaining 4800 bags on board. The defendants paid upon the 1200 bags, but the plaintiff sued them on the whole 6000. Parke, B., delivering the judgment of the Exchequer Chamber, said: "We have no doubt that the plaintiff might have recovered, in the events which happened, a total loss, if he had been insured by a policy properly adapted to the case, *and so drawn as to cover his special interest* from the time that the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profits, not merely by the loss of all the rice by the perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated. As that *special interest* was necessarily the basis of an action brought to recover on the whole 6000 bags, and the plaintiff had not insured that special interest but only the ordinary profits of a parcel of rice shipped on board the particular vessel and against the losses specified, the plaintiff failed in his action."¹

Reinsurance.

On the contrary, where a policy intended as a reinsurance, but not so expressed on the face of it, or any notice given to the underwriter that it was so intended, was expressed to be "£5000 on cotton," and the same was put in suit, the defence being that the interest of the assured was not described in the policy, the Court of Appeal gave judgment for the plaintiff, holding the interest of the assured to be sufficiently described. "The assured here had a direct interest in the safe arrival of the cotton, not in any way a collateral interest

¹ *McSwiney v. Royal Exch. Assur. Co.*, 14 Q. B., in error, 646, 660. *S. P.*, *Halhead v. Young*, 6 E. & B.

312; 25 L. J. (Q. B.) 290. See these cases referred to again in next chapter.

in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against."¹

The extent of the interest of the party insuring need never be specified in the policy, for it is a well-established rule that a party interested only to a certain extent in property, which he owns in common with others, may effect insurance generally without specifying his interest, and will recover for such interest as he has.² Thus, a mortgagee may recover under a policy *on ship* to the extent of his mortgage;³ or, one of several part-owners of a ship may insure the freight generally without specifying what share he has in the ship, and he may declare generally and recover for such interest as he has.⁴ Ship and freight.

The above positions have received abundant illustration in the jurisprudence of this country and the United States. Thus, with regard to the nature of the interest, Lord Mansfield, in the case of *Glover v. Black*, after deciding, solely on the ground of the usage of merchants, that the interests of the lender on bottomry and respondentia must be specifically described in the policy, adds, "But we by no means say that under an insurance on goods at large, a man may not be permitted to give in evidence a mortgage or other special lien."⁵ "I admit," says Park, J., "that a party who has Goods.

¹ *Mackenzie v. Whitworth*, 1 Exch. Div. 36, 44; below, L. R., 10 Ex. 142.

² The principle is laid down, 1 *Emerigon*, ch. x. s. 1, p. 299.

³ *Irving v. Richardson*, 1 Mood. &

Rob. 153; 2 B. & Ad. 193.

⁴ *Rising v. Burnett*, 2 Marshall, Ins. 738.

⁵ *Glover v. Black*, 1 W. Bl. 423; see also 3 Burr. 1461.

only a special interest in goods may recover, in respect of that interest, on a general insurance."¹

One of the first cases in direct illustration of this point is that of *Carruthers v. Shedden*, in which it appeared that a general insurance "on coffee" had been effected by a London broker, "by order and for account of N. D. & Co.," a London mercantile firm, who were interested as part-owners with others in seven-tenths of the coffee, but who had also an insurable interest in the whole of it, as consignees of the cargo, and as having a lien on the whole for advances. The Court held that, under the general form of policy, N. D. & Co. might protect any or all of these different species of interest; that the nature of the several interests need not be expressed in the policy; and that the assured were not bound to elect on which they would proceed.²

Upon the same principle a general policy "on goods,"³ has been held sufficient to cover the interest of carriers on goods entrusted to their care, so as to protect them against loss arising from damage done to such property by the perils insured against, whereby they were obliged to make compensation to the owners, and were besides put to other expenses.⁴ It was objected that such a policy could not cover such an interest, since it merely purported to protect goods against the usual risks to which the owners of goods are liable; whereas, the loss alleged was one arising out of plaintiffs' liability to a risk to which carriers are liable. But

¹ *Palmer v. Pratt*, 2 Bing. 192.

² *Carruthers v. Shedden*, 6 Taunt. 114; *S. C.*, 1 Marshall, R. 416.

³ The policy, which was intended to cover the interest of plaintiffs, as barge-owners, in the property carried to and fro for hire in their barges for a year, was a common printed form of policy on ship and goods, filled up and altered in a very clumsy manner so as to adapt it to the object in view; by it the plaintiffs were insured for twelve months "by canal navigation boats, containing goods,

at work between London, Wolverhampton, and Birmingham, &c., backwards and forwards, and in any rotation, upon goods, and on the body and tackle, &c., on thirty boats, as per margin;" in the valuation clause it was declared that the subject of insurance was agreed between the parties to be "twelve thousand pounds on goods as interest shall appear hereafter."

⁴ *Crowley v. Cohen*, 3 B. & Ad. 478. *S. P.*, *Joyce v. Kennard*, L. R., 7 Q. B. 78.

the Court, although Lord Tenterden admitted that it might have been better if the policy had expressly shown that the object was to indemnify the plaintiffs as carriers, were yet unanimously of opinion that it was sufficient as it stood, on the ground that it is only necessary to state accurately the subject matter, not the interest which the assured has in it.

The decisions upon this subject in the United States go to the full extent of the English law; and the doctrine seems now to be established there, that a mortgagee may insure the subject of the mortgage, either generally, or under a direct description, without specifying his interest to be that of a mortgagee.¹ In the United States.

¹ See the cases collected, 1 Phillips, Ins. no. 419 et seq.

CHAPTER III.

THE PARTIES TO MARINE INSURANCE.

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Who may be assured.

In treating of persons as parties to a contract of marine insurance, we shall find that the general doctrine of law, as to the capacity and incapacity of persons to make a contract, is essentially modified by the peculiar nature of this contract, the sole object of which being indemnity against certain losses, requires in the person contracting for indemnity an interest in the subject insured in respect of which he may be damnified. Even that general rule is liable to be further modified by express prohibitions of the municipal law, and by the necessities of our war policy, and the principles of international law.

It is obvious that a contract, which purports to provide an indemnity for the assured against loss, becomes, when perverted to the purposes of one who has no interest in the subject insured in respect of which he can suffer loss, nothing

better than a bet or wager upon the event of the voyage or adventure described in the policy. Such policies, with no interest to justify the assured in making them, came into frequent use in the reign of Charles the Second, and in the time of Queen Anne our Courts of justice unfortunately pronounced them to be valid and legal. An Act of Parliament (19 Geo. 2, c. 37) afterwards declared them illegal in respect of the property of British subjects; and the consequence is, that as to all that is not the property of British subjects there may still be a contract of insurance made with those who have no interest whatever in the subject insured.¹ As to British property, however, the statute in effect reduces the policy once more to a contract of indemnity, and raises the legal presumption, which may be challenged by way of defence, that the assured in every instance has in the subject of insurance an interest at risk.

We have already considered the Subjects of Insurance. The term Interest, as we are now using it, does not denote any one of these Subjects, but rather the commercial advantage arising to the person assured out of some beneficial relation which he has with the subject insured.

By the very nature therefore of the contract, as now enforced in the Courts of this country, those who are parties to a policy of marine insurance in respect of British property are presumed to have an insurable interest in the property specified, and are deemed without such interest incapable of putting the policy in suit on their own behalf.

Those only
may be in-
sured who
have an
insurable
interest.

This insurable interest, indispensable to one who on his own account would attempt to enforce a contract of marine insurance, is thus described by a Judge of the highest legal reputation:—"A man," says Lawrence, J., "is interested in a thing to whom advantage may arise or prejudice happen

Description
of insurable
interest.

¹ Unless indeed this be now altered by the declaration that all contracts by way of gaming or wagering are

null and void under the 8 & 9 Vict. c. 109, s. 18.

from the circumstances which may attend it; and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing and the interest derivable from it may be very different. Of the first, the price is generally the measure; but by interest in a thing, every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."¹

What is an
Insurable
Interest.

Ownership of
the chattel
indefinitely
modified.

The plainest instance of an insurable interest is the ownership of the subject of insurance. The variety of ways in which this ownership may be modified suggests again the various questions, some of them of considerable nicety, by which the inquiry as to the insurable interest of the assured may be perplexed. The chattel owned may be held in trust, or may be subjected to incumbrances, such as mortgages and liens, or to rights in other persons, as by deed of demise or contract of charter-party, or it may be sold under a reservation of rights or liabilities in the vendor, or may be possessed so conditionally as to be liable to defeasance at the

¹ *Lucena v. Craufurd*, 2 B. & P. N. R. 269, 302; and by the same learned Judge, *Barclay v. Gousins*, 2 East, 544; see also on the same sub-

ject, 1 *Marshall, Ins.* 101, 102; 1 *Phillips, Ins.* no. 172 et seq.; 3 *Kent's Comm.* 276, 277.

will of another,¹ or to seizure for a forfeiture incurred before the voyage described in the policy.² In all these instances an insurable interest undoubtedly exists, and independent insurable interests may co-exist in several persons at the same time, but whether under certain modifications such as may be supposed in the circumstances an insurable interest does exist in a particular person may be a somewhat difficult question.

Besides "the property of the thing," there may be an "interest derivable from it," a "benefit or advantage directly arising out of or depending on such thing," or a liability coupled with the loss of the thing, constituting an insurable interest in the person for whom such benefit or on whom such liability exists. It may be but an expectancy founded on a present existing legal title, or an inchoate right under a contract made indeed, and already in the inception of execution. Freight, for instance, in its various acceptations under insurance law,³ whether it be ship's earnings, chartered hire, or enhanced value, becomes an insurable interest the moment that a title to it so accrues from the circumstances as that nothing but the intervention of the perils insured against could intercept the benefit. Profits and commissions are similar instances of insurable interest, consisting of expectancy founded upon existing title, and liable only to be prevented by the perils insured against, although in the second of these two instances there is generally a total absence of ownership of the chattel from which the commissions are derivable. So, the liability of canal owners, or carriers by water, or of insurers, to compensate or indemnify in respect of losses affecting the property carried or insured by them, is such an interest as is insurable.⁴

Benefit,
advantage, or
liability.

¹ Per Lord Ellenborough, *Stirling v. Vaughan*, 11 East, 629.

2 B. & P. N. R. 319, 320.

³ See ante, p. 31.

² *Wilkes v. People's Fire Ins. Co.*, 19 N. Y. 184; 1 Phillips, no. 195; per Lord Eldon, *Lucena v. Craufurd*,

⁴ *Crowley v. Cohen*, 3 B. & Ad. 478; *Joyce v. Kennard*, L. R., 7 Q. B. 78; *Stephens v. Australasian Ins. Co.*,

Must be
liable to the
perils insured
against.

Again, an interest, in order to be insurable must be such as to be immediately, and not only by way of consequence, affected by the perils insured against in the policy. Thus profits, by evidence of the state of the market, would have been secured but for the loss of the goods, commissions but for the same calamity, freight but for the disabling of the ship by the perils of the sea. A person, however, who advances money in this country to a British shipowner for the repair of his ship, acquires thereby no insurable interest, unless the money be secured by some such legal interest in the vessel as a mortgage, or bottomry lien, and yet the loss of the ship may by way of consequence involve the loss of the money. The following case furnishes both an affirmative and negative illustration of the principle under consideration. The assured held shares in the Atlantic Telegraph Company, but his shares could not be exposed to the perils insured against, and consequently were not insurable; the cable might be exposed to the perils, but could not be the property of the assured, for it was the property of the company; both the shares and the cable, however, were described in the policy in such a way that this, coupled with other parts of the description, led the Court to the conclusion that the adventure of laying the cable was the intended subject of insurance, and as his shares gave him a direct interest in that, which, moreover, was exposed to the perils insured against, this was held to be such an insurable interest as sustained the policy.¹

When
possessed.

Again, the time of the loss is the moment at which the assured's rights under the policy are determined, according as his title, whence flows his insurable interest, was then valid and complete or otherwise. So that one who is merely in

L. R., 8 C. P. 18. "So the liability of captors to pay costs and charges if they had taken possession improperly, and also their liability to render back property which should turn out to be

neutral"—per Lord Eldon, in *Lucena v. Craufurd*, 2 B. & P. N. R. 323.

¹ *Wilson v. Jones*, L. R., 1 Exch. 193; 2 Exch. 139.

treaty for the purchase of a ship at the moment of her loss, or who has insured freight while his vessel is still but a seeking ship, and she goes to the bottom, cannot be said to have an insurable interest. The expectation of benefit to arise from a subject in which the party insuring is not actually interested at the time of loss, but only expects to be interested, is the mere expectation of an expectation, and is not an insurable interest. Such, for instance, would be the expectation of commissions to arise out of the sale and disposal of a homeward cargo, which was neither ready for, nor loaded on board the ship at the time of her loss,¹ or the expectation of profit to arise out of the sale of goods which have never vested in the party insuring under any legal contract.² The expectation of profit on goods which, though ready and contracted to be shipped, are not actually on board at the time of loss, is not such an insurable interest as can be protected by the ordinary form of policy.³

The expectation of an expectation is not insurable.

Nor profit on goods never vested, or shipped.

The interest that shall entitle the assured to recover must be a subsisting interest during some period of the pendency of the risk, and at the time of the loss. Formerly, the rule was so laid down as to extend also to *the time of effecting the policy*;⁴ but it is now established that an insurable interest whilst the risk is still pending, and at the time of loss, is sufficient; indeed, it is every day's practice to effect insurances in which the allegation of interest at the time of effecting the policy could not be made with any degree of truth, as, for instance, where goods are insured on a return voyage long before they are bought.⁵

¹ Knox v. Wood, 1 Camp. 542.

² Stockdale v. Dunlop, 6 M. & W. 224.

³ McSwiney v. Royal Exch. Ass. Co., 14 Q. B. 646; Halhead v. Young, 6 E. & B. 312; S. C., 25 L. J. (Q. B.) 290. It is an interest which may be insured under a form of policy, properly adapted to protect it; per

Parke, B., delivering judgment of Exchequer Chamber, 14 Q. B. 659, 660.

⁴ Lucena v. Craufurd, 2 B. & P., N. R. 295; see also Marsh v. Robinson, 4 Esp. 98.

⁵ Rhind v. Wilkinson, 2 Taunt. 237.

It must, however, be always alleged, and, if traversed, be proved, that the party on whose account and for whose benefit the policy was made, was interested in the subject of insurance whilst the risk was pending, and at the time of loss. So that where, after averment of interest in three as part-owners of a ship, it appeared that one of them had before the loss parted with his share to one of the other part-owners, it was held, that there was no right of action in the three plaintiffs jointly.¹ If the transfer of interest had been after loss, the underwriter could not have resisted the claim.²

The loss, before which an interest must have commenced, according to this rule is a total loss. The rule, however, does not preclude from recovering for an average loss sustained in respect of the subject of insurance before the interest began, provided the loss in question falls in virtue of the terms of the transfer upon the person for whom the policy is put in suit. Accordingly it is decided in an action for an average loss on a policy on goods, "lost or not lost," that it is no bar to aver that the interest in the goods was not acquired till after the loss, it being at the same time admitted, that the plaintiff had an interest in such goods during the voyage to the amount insured.³

After these general observations respecting the nature of insurable interest, we turn now to consider it more in detail, as growing out of some of the usual relations sustained in respect of the more ordinary subjects of insurance.

Shipowner
and Char-
terer.

The first of these in order is the shipowner and the charterer. The insurable interest of the owner in his ship still continues to the full amount, notwithstanding he has demised her under covenant to one who thereby makes himself responsible for her full value; for he is not bound to trust

¹ *Powles v. Innes*, 11 M. & W. 10.

² *Sparkes v. Marshall*, 2 Bing.
N. C. 774; *Lloyd v. Fleming*, Lloyd

v. Spence, L. R., 7 Q. B. 299.

³ *Sutherland v. Pratt*, 11 M. & W.
296.

exclusively to the credit of the charterer.¹ In that case, the charterer also has an insurable interest in the ship to the full extent of his liability in respect of her. Thus, in the United States, where the owner of one-half of a schooner hired the other half, under a covenant, that in case of her being lost within the terms of the charter-party, he would pay the other part-owner the value of his moiety, he was held to have an insurable interest to the full value of the ship.² As to ship.

Two persons joined in the purchase of a ship, and they were registered each for one-half the vessel. One of them was unable to pay for his half, and yet continued to appear on the register as before; the other, who paid for the whole, but never had any assignment or mortgage executed of his co-owner's share, or acquired any lien thereon for the money so paid, insured the whole vessel in his own name and for his own account, upon authority from his co-owner so to do, and he was held to have an insurable interest on the vessel to her full value.³

Generally speaking, the shipowner alone has an insurable interest in freight, whether by that word be meant freight, properly so called; or the chartered hire of the vessel. As to freight.

In some cases, however, the charterer may have an insurable interest in freight. If he either re-charters the ship or puts her up as a general ship for the transport of other people's goods on freight, he stands, *pro hac vice*, in the relation of shipowner, and has an insurable interest in the freight he expects to earn.⁴ Moreover, as in this country the

¹ *Hobbs v. Hannam*, 3 Camp. 93.

² *Oliver v. Greene*, 3 Mass. Rep. 133, cited 1 Phillips, Ins. no. 325.

³ Provincial Ins. Co. of Canada v. Le Duc, L. R., 6 P. C. 224.

⁴ The case of *Mellen v. National Ins. Co.*, 1 Hall Rep. 452, decided in the U. S. to the effect that only the excess of freight over the chartered hire is insurable by the charterer, seems to be justly challenged as inconsistent with principle by Parsons

(1 Ins. 175).

That they have an insurable interest, the owner to the full extent of the chartered hire, and the charterer to the whole amount of his expected freight, which may be covered in each case by a policy, cannot be doubted; but it is also quite clear that between them they can only recover to the full amount of the aggregate interest actually at risk. See post, p. 118.

shipowner has an insurable interest in the benefit which he expects to derive, or the profit he expects to make, by carrying his goods in his own ship,¹ there is no reason why the charterer, if he stands in such a position, may not protect his interest by a policy.

Assignee of freight.

The vendor of a ship who reserves his right to the freight being earned at the time, is in the same situation as one who, for good consideration, is assignee of freight. Valid insurances are daily effected in the latter case in this country; and even in the United States, where the practice is to insure ship and freight in the same policy to prevent injustice in case of abandonment, a policy on such an interest has been held valid.²

The charterer: as to dead freight.

A charterer who agrees to pay dead freight in case the ship be prevented by political or other circumstances from discharging her outward or shipping her return cargo, has an insurable interest to the same extent which may be covered by a policy in the terms of the charter-party.³ In this case it was the contingent determination of the adventure by the foreign government at the port of discharge which was the risk insured, and it was insured for the charterer; the shipowner might at the same time have insured his interest in freight under a common policy against ordinary sea risks.

Advances on freight.

A charterer who advances money in part payment of the freight, purchases thereby an insurable interest in the cargo beyond its prime cost to the extent of the money advanced; for the money cannot, in case of the loss of the ship or cargo, be recovered back, so that the loss of ship or cargo involves the loss of the money advanced.⁴ The charterer, after such an advance, is like a shipowner conveying his goods in his

¹ *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N.C. 519.

² *Paradise v. Sun Mutual Ins. Co.*, 6 La. Rep., cited 1 Phillips, no. 477.

³ *Puller v. Staniforth*, 11 East, 232; see also *Puller v. Glover*, 12 East, 124; *Puller v. Halliday*, 12

East, 494.

⁴ Anonymous case, 2 Shower, 283; *De Silvale v. Kendall*, 4 M. & Sel. 37; observations of Bayley, J., in *Manfield v. Maitland*, 4 B. & Ald. 582, 585; *Allison v. Bristol Mar. Ins. Co.*, 1 App. Cases, 209, and the cases referred to therein.

own ship; the value of the goods is enhanced to the extent of the freight, and that value in each case is insurable,—by the shipowner as freight,¹ and by the charterer as advances on account of freight.² But for this purpose it must appear, by fair and reasonable inference from the words in the charter-party, that the money paid is an advance in part payment of the freight.³

Hence, where the covenant as to payment of freight was in the following terms:—"Such freight to be paid as follows, viz., 120*l.* British sterling for freight of the outward cargo to Maranham, and as much cash as may be found necessary for the ship's disbursements at Maranham, to be advanced by the charterer or his agents to the master when required, *free from interest or commission*, &c., and the *residue of such freight* to be paid on the delivery of the cargo in Liverpool," &c.: Lord Ellenborough and the Court of King's Bench held, that under these terms the money must have been advanced specifically on account of freight, and therefore could not, upon loss of the ship before freight earned, be recovered back as money had and received.⁴ So, where the stipulation was in these words:—"Cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, *but subject to insurance*, and 2½ per cent. commission," Lord Campbell, C. J., said, that this mention of insurance stamped the transaction indelibly as a payment on account of freight, and not a mere loan; and the rest of the Court of Queen's Bench concurred with him in holding accordingly.⁵

¹ Flint *v.* Flemyng, 1 B. & Ad. 45; Devaux *v.* J'Anson, 5 Bing. N. C. 519.

² See cases *supra*, and Wilson *v.* Martin, 11 Exch. 684; 25 L. J. (Ex.) 217; and see Ralli *v.* Janson, 24 L. J. (Q. B.) 97; 4 E. & B. 500.

³ Abbott, C. J., in Manfield *v.* Maitland, 4 B. & Ald. 585; Williams *v.* North China Ins. Co., 35 L. T., N. S. 884; MacLachlan on Shipping, 519.

⁴ De Silvale *v.* Kendall, 4 M. &

Sel. 37. Lord Ellenborough and Dampier, J., lay some stress upon the words "free from interest and commission," as showing that the money advanced was not intended to have been a loan.

⁵ Hicks *v.* Shield, 7 E. & B. 633; 25 L. J. (Q. B.) 205, 208. Accord. Drooge *v.* Suart (The Karnak), L. R., 2 P. C. 505, 514; Currie *v.* Bombay Native Ins. Co., L. R., 3 P. C. 72, 83. See Watson *v.* Shankland, L. R., 2 Ho. of Lds. Scot. 304.

In both these cases, as Lord Tenterden remarks of the former of them, "the instrument was studiously framed so as to make the freighter lose the money advanced by him, unless the owner reaped the benefit by the ship's coming home safe."¹ Where, however, the charter-party does not, on the face of it, clearly and distinctly import that the sum advanced is to be a payment on account of freight, it is to be regarded as a mere loan, which the freighter has a right to recover, whatever be the issue of the adventure, and in which he has, therefore, no insurable interest. Hence, where the charter-party, after stipulating the amount of freight and mode of its payment, merely contained the words, "The captain to be supplied with cash for the ship's use," the Court held, that the charterer had no insurable interest in bills of exchange drawn on him by the master in respect of cash so supplied, it not appearing by the charter-party to be advanced as a part payment of freight.²

But where the freighters of a general ship paid her disbursements abroad, and by request of the owners took the captain's bill "drawn against freight" on the consignees of the cargo in this country, in discharge of such disbursements, it was held that, as the freighters had agreed to advance on "credit of the freight," which was distinctly pledged by the captain's bill, they had an insurable interest in freight, and might recover on a policy describing their interest as "an advance on account of freight."³ By a charter-party the freighters were to pay for the use of the ship "for the voyage 10,000 dollars, in manner following: viz., in China, all the sums that might be necessary for the payment of port charges and other incidental expenses (the latter not to exceed 2000 dollars), and the balance at thirty days after the ship's return to the port at Buenos Ayres:"

¹ Per Abbott, C. J., in 4 B. & Ald. 585.

² *Manfield v. Maitland*, 4 B. & Ald. 582; see also *Saunders v. Drew*, 3 B. & Ad. 445.

³ *Wilson v. Martin*, 11 Exch. 684;

S. C., 25 L. J. (Ex.) 217. This, by Willes, J., is designated an equitable assignment of freight; *Seagrave v. Union Marine Ins. Co.*, L. R., 1 C. P. 305. See *Ellis v. Lafone*, 8 Exch. 546; 22 L. J. (Exch.) 124.

and Lord Tenterden admitted that the freighters had an insurable interest in these payments at Canton, provided it were covered by a policy "on money paid for shipment of goods to be transported to Buenos Ayres," and not by a general policy on freight.¹

"Money advanced to the assured as owner of the ship, on account of freight of the cargo loaded on board her, and subject to the risk of the voyage," is really and substantially freight, and by the shipowner, who has to repay such advance, may be insured by a policy on "money advanced on account of freight."²

According to the principles already discussed, in treating of the *Subjects of Marine Insurance*, an insurable interest in freight depends on the co-existence of two rights in the assured at the time of the loss, namely,—a title, legal or equitable, to the ship, and an inchoate right to the freight:—a title to the ship, for the right to freight is one of the rights of ownership;³—and such an inchoate right to the freight as nothing but the intervention of the perils insured against may intercept.⁴ We have seen, however, that the shipowner conveys an insurable interest by assigning over for value freight that is being earned,⁵ or by accepting prepayment of freight from the shipper, who may thereupon insure it as freight paid in advance, or in the name of *goods* by reason of the enhanced value thereby of them.⁶

When freight becomes an insurable interest.

¹ *Winter v. Haldimand*, 2 B. & Ad. 649. The dicta of Lord Tenterden, above referred to, are in pp. 653, 658 of the report.

² *Hall v. Janson*, 4 E. & R. 500; 24 L. J. (Q. B.) 97.

³ *Camden v. Anderson*, 5 T. R. 709; and see *S. C.*, 6 T. R. 723; 1 B. & P. 272; see also *Marsh v. Robinson*, 4 Esp. 98; *Davidson v. Case*, 5 M. & Sel. 79, 82; *Miller v. Woodfall*, 8 E. & B. 493; *Stewart v. Greenock Marine Ins. Co.*, 2 H. of Lds. Cas. 159; *Hickie v. Rodocanachi*, 28 L. J. (Ex.) 273; 4 H. & N. 455.

⁴ *Lucena v. Craufurd*, in error, 3

B. & P. 95. Hence a right to recover for a loss incurred during the currency of the policy and after an inchoate right has accrued notwithstanding that the policy is a time policy, and must have expired long before the freight could have been earned by the completion of the voyage; *Michael v. Gillespy*, 2 C. B., N. S. 627; 26 L. J. (C. P.) 306.

⁵ That it is assignable, *Willis v. Palmer*, 29 L. J. (C. P.) 194; 7 C. B., N. S. 340; *Lindsay v. Gibbs*, 22 Beav. 522; 2 Jur., N. S. 1039, and see p. 64, note 3, ante.

⁶ Ante, pp. 62, 63.

Where no
charter-
party.

In the absence of a charter-party, as in case of a general ship or of a shipowner proposing to load with goods on his own account, there is no inchoate right to freight, and, therefore, no insurable interest therein, unless the goods, if not actually loaded on board, are so situate with respect to the ship and the ship with respect to them as that nothing but the perils insured against can prevent freight being earned.¹

In the following case, but for the want of any legal obligation to provide and put a cargo on board, it must have been held that only the perils insured against had intercepted the earning of freight. A shipowner sent his vessel on an adventure of his own to the Cape de Verd Islands, intending to load her with orchella weed, but after 150 bags of it had been put on board, the ship was lost in a storm. In an action on a policy on freight at and from the ship's loading port or ports in any or all the Cape de Verd Islands to Liverpool, it was held that he could not recover except in respect of the 150 bags, because although there was a reasonable expectation that the governor of the islands would have supplied the rest of the cargo, and it was known that people had been engaged to pick a sufficient quantity off the rocks and prepare it, yet there had been no contract whatever binding the governor to supply it.²

Under char-
ter-party.

On the other hand, where the freight intended to be insured is stipulated by charter-party, the inchoate right to such freight, and consequently an insurable interest therein, vests directly there is an inception of performance of the contract by the shipowner.³

A ship lying at Bombay was chartered for a voyage from

¹ Per Eyre, C. J., in *Curling v. Long*, 1 B. & P. 636; *Montgomery v. Egginton*, 3 T. R. 362; *Truscott v. Christie*, 2 B. & B. 320, 326; *Parke v. Hebson*, *ibid.* 329; *Forbes v. Aspinall*, 13 East, 323, 331; *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N. C. 518.

² *Patrick v. Eames*, 3 Camp. 441.

³ *Rankin v. Potter*, L. R., 6 H. of Lds. 83; *Foley v. United Fire and Mar. Ins. Co. of Sydney*, L. R., 5 C. P. (Ex. Ch.) 155; *Barber v. Fleming*, L. R., 5 Q. B. 59; *Thompson v. Taylor*, 6 T. R. 478; *Horncastle v. Stuart*, 7 East, 400; *Atty v. Lindo*, 1 B. & P. N. R. 236; *Davidson v. Willasey*, 1 M. & Sel. 312; *MacLachlan on Shipping*, c. x.

Howland's Island to a port in Great Britain; and a policy was effected on freight by her, "chartered or otherwise," from Bombay to Howland's Island and thence to the United Kingdom. She sailed in ballast from Bombay for Howland's Island, and, before reaching it, was lost by the perils insured against. This was a loss upon the voyage described in the policy, and after an inception of performance under the contract in the charter-party; it was therefore held that the shipowner was entitled to recover.¹

If in the above case she had sailed on a seeking voyage there seems good reason in law for thinking the judgment of the Court must have been different. Instead of this, if she had sailed direct for Howland's Island, as she did, but with cargo, it seems the Court must notwithstanding have held as they did.²

A ship while on a voyage from the Clyde to New Zealand was further chartered to bring home a cargo from Calcutta to the United Kingdom, and a policy on this homeward freight was effected for the risk from the Clyde to New Zealand and for thirty days after arrival there; she became a constructive total loss at New Zealand before the expiry of this policy, and there was a recovery of the homeward freight under it as for a total loss.³

A vessel when about to sail with cargo from Calcutta to Mauritius was further chartered for a voyage from Mauritius to Akyab and thence to the United Kingdom, the charter-party stipulating that "she should with all convenient speed sail on her present voyage to Mauritius, and having discharged her cargo there, to sail to Akyab," &c. She arrived at Mauritius in good safety, and when about two-fifths of her cargo were discharged, she was driven ashore with the residue on board, and reduced to a total wreck. Upon a policy on freight "at and from Mauritius to rice ports," &c., it was held that there had been an inception of performance under

¹ *Barber v. Fleming*, L. R., 5 and *Marine Ins. Co. of Sydney*.
Q. B. 59.

³ *Rankin v. Potter*, L. R., 6 H. of

² See *infra*, *Foley v. United Fire* Lds. 83.

the contract in the second charter-party by sailing from Calcutta, and consequently an inchoate right to the freight under that charter-party, and that notwithstanding the whole of her cargo was not discharged at the time of the loss, the policy, being "at and from Mauritius," had already attached.¹ To the same effect is *Warre v. Miller*, in which it was held under a policy "at and from Grenada," that the ship was already necessarily preparing for the homeward voyage by delivering her outward cargo at different places in the island, and consequently that the policy on homeward freight had attached when she perished at the entrance to Grenville Bay in that island, where she was to take on board homeward cargo.²

Shipowner's
insurable
interest as to
other things.

A shipowner who has entered into recognizance in the Admiralty Court to pay the salvors of ship and cargo, then at a distant port, has an insurable interest in the average contribution due to him from the owners of cargo.³ He has also an insurable interest in protecting himself against charges imposed by the Passenger Acts (now the 18 & 19 Vict. c. 119, and 26 & 27 Vict. c. 51). Under a policy "on passage money against all charges and liabilities to which owner or charterer might be subject, under sects. 46 to 51 inclusive, of the Passenger Act, 1852" (15 & 16 Vict. c. 44), expenses incurred in forwarding passengers from a British colony, where the ship was wrecked, to their place of destination, were held to be recoverable;⁴ but under a similar policy, the cost of maintaining passengers during a necessary delay of six weeks for repairs at a port of distress was held not to be recoverable, because the section of the Act which imposed that liability was not specified in the policy.⁵ He has, besides, an insurable interest that enables him to effect a valid policy against the casualties enumerated in Part IX of the Merchant Shipping Act, 1854, ss. 503-506,

¹ *Foley v. United Fire and Marine Ins. Co. of Sydney*, L. R., 5 C. P. 155 (Ex. Ch.).

² *Warre v. Miller*, 4 B. & C. 538.

³ *Briggs v. The Merchant Traders' Assoc.*, 13 Q. B. 167.

⁴ *Gibson v. Bradford*, 4 E. & B. 586.

⁵ *Willis v. Cooke*, 5 E. & B. 641.

as amended by the Act of 1862 (25 & 26 Vict. c. 63, ss. 54, 55). But instead of concisely referring to part of one, or to any or all, of these sections in the policy, some prefer to substitute what is called a running-down clause, often drawn up on the instant, and not unfrequently thereby miss that complete protection at which they had aimed.¹

An insurable interest in goods vests in him who has the right of property. It is in the shipper if he undertake to deliver at a distant port, or, without any undertaking, has the bill of lading drawn deliverable to himself, and indorses it to his own agent;² or attaches it to a negotiable bill of exchange, as a security in the hands of the holder of the latter.³ But if he buys and ships, although at his own cost, goods "on account and risk of" his foreign correspondent, and so invoices them, the property already vested is not altered by his merely sending an unindorsed bill of lading to his correspondent, accompanied by a bill of exchange for his acceptance.⁴

Shipper,
freighter,
vendor,
vendee.

As to goods.

There may be an insurable interest vested in a purchaser of goods, although it may not be clear that there has been a transfer of the property to him, in case the shipment on board be at his risk and he be liable to pay for the goods whether they arrive or not. The appropriation of the goods, shipped indiscriminately, between different purchasers, may turn out to have nothing to do with the vesting of the property, although deferred till after arrival.

Drake & Co. sold to the plaintiff Stock 200 tons of German

¹ Taylor v. Dewar, 5 B. & S. 58; 33 L. J. (Q. B.) 141.

² Mitchel v. Ede, 11 A. & E. 888; Brandt v. Bowlby, 2 B. & Ad. 932. Whether a reservation of the *jus disponendi* by the bill of lading be necessarily incompatible with the passing of the property, it is not so as to the vesting of an insurable interest; Stock v. Inglis, 10 App. Cas. 270.

See Ogg v. Shuter, 1 C. P. Div. 46; Castle v. Playford, L. R., 7 Ex. 98.

³ Turner v. Trustees of the Liverpool Docks, 6 Exch. 543 (in error).

⁴ Coxe v. Harden, 4 East, 211, 217, 218; Gurney v. Behrend, 3 E. & B. 622; 23 L. J. (Q. B.) 265; Seagrave v. Union Marine Ins. Co., L. R., 1 C. P. 305; and see MacLachlan on Shipping, 400, 401.

beet sugar, f. o. b. at Hamburg, to average 88 degrees of saccharine contents, between the limits of 85 and 92; payment to be by cash in London in exchange for bills of lading. Drake & Co. had already sold to B. & Co. 200 tons of the same quality of sugar on the same terms, and the plaintiff ultimately became the purchaser from B. & Co. of their parcel also, with no other change of terms except a slight increase of price. The plaintiff engaged room for both parcels of sugar on board a steamer trading from Hamburg to Bristol, and Drake & Co. by their agent at Hamburg shipped sugar for both contracts in bags, each of them marked with the degree of saccharine contents in the sugar contained in that bag, but without allocating the bags to the respective contracts, intending that to be done on arrival in England. The plaintiff effected a policy on the sugars, which were afterwards totally lost on their way to England. Drake & Co. in England, after hearing of the loss, allocated the several bags to the respective contracts, and received payment for both parcels. In the Courts below the question chiefly in dispute in the action on the policy by the plaintiff had been whether, as the allocation of the bags to the respective contracts had not been made at the time of the loss, there could be in the plaintiff any insurable interest in the sugars; and in the Court of Appeal it was held, that in accordance with the custom of the trade the contracts under the circumstances were in effect fully performed, and that thereby, contrary to the judgment of the Judge at Nisi Prius, an insurable interest was vested in the plaintiff. The Lords, declining to give any opinion on the view on which the Court of Appeal had based their decision, held, that as by a term of each contract the sugar was to be shipped free on board at Hamburg by the vendors, the effect was that as soon as it was shipped it was at the risk of the plaintiff, and that whether it arrived or not he was bound by his contract to pay for it on presentation of the bills of lading, and, therefore, that whether the whole legal property in the sugar had vested in him or not, he had an insurable interest in the sugar on which he had sustained

a loss to the full amount of the price. As for the allocation of the bags to the respective contracts, it was regarded by their Lordships rather as being merely an arrangement to be effected between the two purchasers; and Lord Blackburn saw no reason why an interest in an undivided parcel of goods might not be described as an interest in goods just as much as if it were an interest in every portion of the goods.¹

Whether the vendee after the stoppage of the goods *in transitu* retains an insurable interest in them, or what insurable interest is acquired by the vendor by virtue of the stoppage, are questions dependent on another question still undecided, whether such stoppage be a rescission of the contract.² If, as the better opinion seems to be, stoppage *in transitu* is merely the revesting of a lien, the vendor in that case has an insurable interest to the extent of his own lien, and of his liability to others for the residue of value.

In case of stoppage *in transitu*.

The insurable interest, depending in so many instances on the terms of the contract, will vary with these terms accordingly. These may be such as to postpone any vesting of the title to the ship or goods sold, or may otherwise vary indefinitely the rights and liabilities of the parties, leaving both pecuniarily interested in the safety of the property; the insurable interest from being nothing in the case of one of the parties, as on the first hypothesis, will come to vary indefinitely, and to be, as upon the latter hypothesis, in the hands of both.

Insurable interest varies with the terms of the bargain.

Where the owner of a ship had sold her to a purchaser, under an agreement that he would pay the purchaser 500*l*. if a loss happened within three months, the Court held, that to this extent he still had an interest in the safety of the ship, and therefore might recover against the members of a

¹ *Inglis v. Stock*, 10 App. Cas. 263; 12 Q. B. D. 564; 53 L. J. (Q. B.) 356.

² See *MacLachlan on Shipping*, 590;

per Lord Blackburn:—"It is pretty well settled now, that it does not rescind the contract; *Kemp v. Falck*, 7 App. Cas. 581.

mutual insurance society to which he belonged, for such amount of contribution as, by the rule of the society, he was entitled to.¹

If, by the terms of the sale, goods ordered by a foreign purchaser are not to vest in him till arrival, he has no insurable interest in such goods before that time; if, however, it appears, from all the circumstances of the case, and the nature of the contract, that the goods are to be at his risk from the time of sale or of shipment, he may at once insure them on his own account.²

In the case of *Anderson v. Morrice*³ the sole difficulty was to ascertain from the written contract whether by intention of the parties the property had passed to the buyer at the time of the loss. The vessel, *The Sunbeam*, was loading the agreed cargo of rice in the Irrawaddy river, off Rangoon, and had received on board by far the larger portion of the cargo, when she suddenly went down at her anchors, taking so much of the cargo as was then on board down with her. The bought note, so far as it is mentioned, was in these terms: "Bought the cargo of rice, per *Sunbeam*, at 9s. 1½d. per cwt. cost and freight. Payment by sellers' draft on purchasers at six months' sight, with documents attached." In the Common Pleas, it was held that by appropriating the rice to the contract by putting it on board, an insurable interest therein had passed to the buyer, the plaintiff. In the Exchequer Chamber, it was held that the contract, being for the cargo of rice per *The Sunbeam*, and the time for making out the shipping documents (which were to be attached to the sellers' draft) not having arrived at the time of the loss, no interest had passed to the buyer, or would pass until the complete cargo was loaded on board.

¹ *Reed v. Cole*, 3 Burr. 1512.

² *Fragano v. Long*, 4 B. & Cr. 219; see also *S. P.* in *Stockdale v. Dunlop*, 6 M. & W. 224; *Joyce v. Swann*, 17 C. B., N. S. 84; *Seagrave v. Union Marine Ins. Co.*, L. R., 1

C. P. 305; *Castle v. Playford*, L. R., 7 Ex. 98; *Inglis v. Stock*, 10 App. Cas. 263.

³ *Anderson v. Morrice*, L. R., 10 C. P. 58; on appeal, *ibid.* 609; 1 App. Cas. 713.

In the House of Lords, the law lords were equally divided on the question, and consequently the judgment of the Exchequer Chamber stands.

An agreement to purchase, followed by a specific appropriation by the vendor of a particular cargo, and acceptance thereof by the vendee, as the thing bargained for, confers upon the vendee an insurable interest in the cargo, so as to entitle him to recover on a claim averring interest to be in himself:¹ and it is no answer to an action in his name on the policy, that he had indorsed the policy over after the loss.²

An insurable interest in profits is dependent on ownership As to profits. of the goods, and the right to recover on the policy is dependent on proof that profits would have been made if the goods had arrived. In the earliest cases, indeed, such as *Grant v. Parkinson*, and *Barclay v. Cousins*, the Court was satisfied with evidence of a general probability of the profitable issue of the adventure founded on the course and character of the trade in which it was made;³ but in subsequent cases the Courts adopted a stricter rule.

In the case of *Hodgson v. Glover*, where the policy was on "profits" upon an adventure from Liverpool to the African coast, the outward cargo to be bartered for slaves, and the slaves to be carried on in the ship to the West Indies for sale, the Court went further and nonsuited the plaintiff, because he did not show that, if no loss had intervened and the slaves had all got to a market, any profit would have been produced.⁴

¹ *Sparkes v. Marshall*, 2 Bing. N. C. 761.

² *Ibid.*

³ *Grant v. Parkinson*, 3 Dougl. 16 (see also *Lucena v. Craufurd*, 3 B. & P. 85, where a report of the case is given from Mr. Dunning's brief and a MS. note; 1 *Marshall, Ins.* 95; 2 *Park, Ins.* 561); *Barclay v. Cousins*, 2 East, 544; see the observations of

Lawrence, J., 550.

⁴ *Hodgson v. Glover*, 6 East, 316. In this case *Lawrence, J.*, differing from what he had said in *Barclay v. Cousins*, where the adventure was exactly similar, agreed with the rest of the Court, and said, "The case is defective in not showing that if there had been no shipwreck there would have been some profit."

Accordingly, in the next case of a similar kind which came before the Court, and in which the profit insured was upon sale of a homeward cargo of flax shipped at Riga for Hull, care was taken to allege in the declaration, and to prove at the trial, that the flax, had it arrived sound, would have realized a profit to the amount insured.¹ This case accordingly gives the rule which must be observed in drafting the statement of claim and preparing the evidence.

In the United States.

In America the rule is different, and several cases there decided establish the doctrine, which has been adopted by the Supreme Court of the United States, that it is a conclusive presumption arising on proof of ownership of the goods shipped that they would have realized a profit in the foreign market.² So that where three-eighths of the goods were lost, the Court held it to be a loss of that proportion of the profits, without inquiring whether there would have been any profits had the goods arrived.³

In respect of the other requisite to this insurable interest in profits, the law of this country and of the United States are at one. "The doctrine," says Mr. Justice (afterwards Chancellor) Kent, "that runs through all the cases, is, that the assured must have an interest in the subject-matter from which the profits are to proceed, in order to prevent the policy from being considered a wager."⁴ "I admit," says Parke, B., "that profits may be insured, but this is on the ground that they form an additional part of the value of the goods in which the plaintiff has already an interest."⁵

What risk.

Whether the goods on which the profits are to arise have been exposed to risk will partly depend on the terms in which that risk is described in the policy. Whenever the policy is in the common form, *i.e.*, "on profits on goods,"

¹ *Eyre v. Glover*, 16 East, 218.

² *Patapsco Ins. Co. v. Coulter*,

³ *Peter's Sup. Court Rep.* 222; 1 *Phillips, Ins. no.* 318; 1 *Parsons, Ins.* 195.

³ *Loomis v. Shaw*, 2 Johns. Cas. 36.

⁴ Per Kent, J., in *Abbott v. Sebor*, 3 Johnson's Cas. (N.Y.) 39.

⁵ Per Parke, B., *Stockdale v. Dunlop*, 6 M. & W. 232.

“beginning the adventure on the said goods from the loading thereof on board,” the party insuring must show that the goods out of which the profits are to arise were actually shipped on board.¹ The policy may be so framed as to cover a loss on profits, &c., on goods not actually loaded on board, but only ready and contracted to be so;² but the intention to cover such risk must be clearly deducible from the terms of the policy, without any resort for that purpose to extrinsic evidence.³

Of course if the goods are not only not on board, but not even ready to be put on board at the time of loss, the assured cannot recover. A merchant effected an insurance on commission to arise upon the sale in Dublin of produce to be shipped at Jamaica, for the homeward voyage; the ship was captured on her homeward voyage, but being released she proceeded to Jamaica, and found no cargo, as it had been forwarded by another ship, and she returned home in ballast. In an action to recover the loss of commission, it was held, that the plaintiff had no insurable interest in such commission;⁴ and Lord Ellenborough said, “It strikes me that this was a mere expectation. The expectation is frustrated by the capture, and the interest was never on board; this is an insurance of the expectation of an expectation.” The defendant accordingly had a verdict; and on motion for a new trial, the Court were clearly of opinion that the plaintiff had not an insurable interest when the loss happened. Lord Ellenborough on that occasion said, “This case carries us into the land of dreams; and, if supported, would introduce the practice of insuring a 20,000*l.* prize in the lottery without purchasing a ticket.”⁵

Knox v.
Wood.

A Liverpool merchant having verbally contracted with a

Stockdale v.
Dunlop.

¹ *McSwiney v. Royal Exch. Ass. Co.*, 14 Q. B. 646; *Halhead v. Young*, 6 E. & B. 312; *S. C.*, 25 L. J. (Q. B.) 290.

² 14 Q. B. 659, 660; judgment of the Exchequer Chamber.

³ *Halhead v. Young*, 6 E. & B.

312; *S. C.*, 25 L. J. (Q. B.) 290.

⁴ *Knox v. Wood*, 2 Park, Ins. 564, 8th ed.; 1 Camp. 543. There is a slight variance between the two reports, which however does not affect the principle here in question.

⁵ 1 Camp. 544.

shipowner for the purchase of a quantity of palm oil "to arrive" by one of his ships, then loading on the coast of Africa, effected an insurance on profits to arise from the sale of this oil on its arrival in Liverpool;¹ in the result, the oil never did arrive in the ship, which was entirely disabled on the coast of Africa, and the merchant brought his action on the policy for a total loss. Proof was given at the trial that the term "oil to arrive per ship" was a mercantile term, and that under such a contract as that made in the present case, if the oil did not arrive in the ship, the plaintiff had no right to it. Under these circumstances the Court held, that as there was no written contract nor any contract at all which the assured could have enforced at law for the sale to him of the palm oil, he had no interest whatever in such palm oil at the time of the insurance or the loss, and consequently had no insurable interest in the profits expected to arise from its sale or disposal.² "At the time of the insurance and the loss," says Parke, B., "there was merely an expectation of possession on the part of the plaintiffs, founded on the mere promise of the vendors, but there was an entire absence of interest in the subject-matter of the insurance."³

A party buying goods of another to arrive and afterwards contracting to sell them to a third party at a profit, has an insurable interest in such profit; unless, however, the goods out of which such profit is to arise were actually on board at the time of the loss, he cannot protect such interest under a policy in the common form.

McSwiney v.
Royal Exch.
Ass. Co.

The plaintiff in London contracted to buy 6000 bags of rice, then supposed to have been shipped at Madras, "to arrive from Madras by the ship *Edward Bilton* before the end

¹ The policy was in the common form, "upon any kind of goods and merchandise, &c., and upon the body, tackle, &c., of the ship, and valued at 500*l.* on profits."

² *Stockdale v. Dunlop*, 6 M. & W. 224. The issue upon the pleadings was, in terms, whether "the plain-

tiffs were interested in the profits to arise and be made from the sale and disposal of the said palm oil."

³ *Stockdale v. Dunlop*, 6 M. & W. 233. See the same principle recognized by Bayley, J., in the case of *Fragano v. Long*, 4 B. & Cr. 219, 222: it was an insurance "on goods."

of May," and afterwards effected a sale of the same rice to a third party at a profit, but on the same terms as to arrival, &c. He then insured the profit under the second contract by a policy in the common form, "on profit of, rice loaden or to be loaden," "beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras." The rice was all ready at Madras to be shipped on board *The Edward Bilton*, and 1200 bags were actually on board, when by perils of the sea the ship was disabled from performing her voyage; the 1200 bags actually on board, being damaged by sea-water, were unshipped and sold; the 4800 bags were forwarded by another vessel, but did not arrive till after the end of May; so that the plaintiff's contracts of purchase and sale became inoperative, and his profits lost. The plaintiff brought his action for a total loss on profit in respect of the 4800 bags, the company having settled for the 1200, and had judgment in the Court below.

The Court of Exchequer Chamber reversed the judgment of the Court of Queen's Bench, and, in delivering their opinion, per Parke, B., say:—"We have no doubt that the plaintiff might have recovered in the events which have happened for a total loss if he had been insured by a policy properly adapted to the case, and so drawn as to cover the special interest from the time the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profit, not merely by the loss of all the rice by the perils of the sea, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies the special interest in profit would have been entirely defeated. But the question in this case arises on the policy declared upon, which is in most respects in the ordinary form, attaching the risk to the ship in the port, and to the goods from the loading on board; and the decision of that question depends on the true construction of the policy alone. According to the true construction of the policy, it

attached to the profit on no goods, nor has there been a loss of profit on any goods by perils insured against, except on the 1200 bags, which has been paid for by the money paid into Court. If, indeed, it attached to profit on those on shore, there has been no loss of that profit by the perils of the sea, but only a retardation of the voyage, for which the defendants are not responsible unless the policy specially provided for such an event.”¹

A case favourably distinguished from the foregoing as having successfully avoided similar errors, was an insurance on behalf of a shareholder of the Atlantic Telegraph Company. The policy was “lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board *The Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and *vice versâ*, &c. The said ship, &c., goods, &c., for so much as concerns the assured by agreement and in this policy are and shall be valued at 200% on the Atlantic cable, value say on twenty shares, valued at 10% per share.” And in the margin, against the usual perils, were these words:—“It is hereby understood and agreed that this policy shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its loading on board *The Great Eastern* until 100 words be transmitted from Ireland to Newfoundland and *vice versâ*; and it is distinctly declared and agreed that the transmission of the said 100 words from Ireland to Newfoundland and *vice versâ* shall be an essential condition of the policy.” The loss, in fact, was the parting of the cable, and consequent loss of the cable itself, when about half the whole length had been paid out. The Court below and the Exchequer

¹ *McSwiney v. Royal Exch. Ass. Co.*, 14 Q. B. 634, in error, 646, 660, 663; *S. P.*, *Halhead v. Young*, 6 E. & B. 312; *S. C.*, 25 L. J. (Q. B.)

290. See the case of *McSwiney v. Royal Exch. Ass. Co.*, commented on per Willes, J., in *Wilson v. Jones*, L. R., 2 Exch. 139, 146.

Chamber afterwards held that this was a policy on profits upon the adventure of laying the cable, and that the loss was by one of the contingencies mentioned in the margin.¹

Turning from the principals to those who so often in the transactions of commerce fill their place and exercise their authority, we come to consignees, factors and agents.²

Consignees,
factors, and
agents.

“There are different sorts of consignees; some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor; others have a mere naked right to take possession”;³ others, again, it may be added, though not entrusted to sell, are yet interested in the property, as having a lien or claim upon it for their advances. It is obvious that the rights of these different kinds of consignees to effect an insurance must vary with the various relations in which they stand to the property and to the consignor.

With regard to consignees who have a mere naked right to take possession, neither being entrusted to sell the property on commission, nor having a lien upon it for advances, Lord Eldon says, “I will not say that they may not insure if they state the interest to be in their principal;” and this may be, in accordance with the terms of the 28 Geo. 3, c. 56, in their

¹ *Wilson v. Jones*, L. R., 1 Exch. 193; 2 Exch. 139.

² Whether a consignee for sale being under advances can insure his own interest, and also that of his consignor, in the same policy, and recover the full amount thereon upon an averment of interest in himself, has been keenly discussed upon the authorities by the Court of Common Pleas in the case of *Ebsworth v. Alliance Mar. Ins. Co.*, L. R., 8 C. P. 596; and the propositions to be found in these pages in relation to the question were severally cited and approved and disapproved of respec-

tively in the judgments delivered respectively by the members of the Court. The case was appealed into the Exchequer Chamber; but on the morning when the appeal was to have been heard, it was withdrawn by consent on both sides upon the suggestion, made before the assembling of the Court, by Bramwell, B., on his own behalf, and on behalf of other members of the Court, on the ground, as I understood at the time, of the inconvenient state of the facts.

³ Per Lord Eldon, *Lucena v. Craufurd*, 2 B. & P. N. R. 324.

own names on account of the consignors, who will be bound by such policy if they have already authorized it, or if they subsequently adopt it.¹ Otherwise, such consignees cannot effect a valid policy.²

With regard to consignees who have a lien or claim on the property in respect of advances, or commission agents to whom it is entrusted for the purposes of sale, or indorsees of the bill of lading to whom a general balance is due, no doubt they may effect an insurance on their own account and recover to the amount of their lien, claim or balance.³

Indorsee of
bill of lading.

The legal value of an indorsed bill of lading is now more liable to be misconceived since the Bills of Lading Act (18 & 19 Vict. c. 111) has, by transferring the contract to the transferee of the property, increased the similarity between this instrument and a bill of exchange. But it must be understood that title to the property comprised in it is not necessarily vested by indorsement in the indorsee. Whatever right he may have under it is a question of evidence touching the intention of the indorser. Consequently, if the shipper, consignor, or owner of the goods, with intention to transfer the property indorses the bill of lading to one and transmits it to him, and then transmits indorsed bills of lading for the same property severally to others, these latter take nothing, because the whole had already vested in the first transferee.⁴ That first transferee alone has an insurable interest in the property of which this instrument is the symbol.

Of course by means of this instrument, and the expressed

¹ *Wolff v. Horncastle*, 1 B. & P. 316.

² See the admirable remarks of Lawrence, J., in his celebrated judgment in *Lucena v. Craufurd*, 2 B. & P. N. R. 307; and see a very able note of Judge Duer, note 2 to s. 10 of vol. ii. pp. 160-174, Duer on Ins.

³ *Wolff v. Horncastle*, 1 B. & P.

316, 323; *S. P.* in *Conway v. Gray*, 10 East, 547; and in *Godin v. London Ass. Co.*, 1 Burr. 489, 494; *Carruthers v. Sheddon*, 6 Taunt. 14; *Flint v. Le Mesurier*, 2 Park, 563.

⁴ *Caldwell v. Ball*, 1 T. R. 205; *McAndrew v. Bell*, 1 Esp. 373; *Hibbert v. Carter*, 1 T. R. 745; *Hubbersty v. Ward*, 8 Exch. 330.

intention of the consignor, the interest conveyed under it and the insurable interest arising upon it may be indefinitely modified. If, for instance, it appear, by satisfactory evidence, that the assignment of the bill of lading is only intended to bind the net proceeds of the consignment in the hands of the consignor's agents, the consignor, notwithstanding such indorsement of the bill of lading, has still an insurable interest in the goods, since he continues to be as directly concerned in their safety as before the indorsement.¹

That a consignee of goods, who is entrusted as a commission agent to sell them, or who has accepted bills on them, or has a general balance against the consignor, has an insurable interest in the goods or derivable out of them, at all events to the extent of his claims, is a position which has received frequent illustration in our jurisprudence. But we have seen² that he must take care to describe the special risks he means to cover, otherwise his insurable interest may be altogether unprotected or otherwise seriously restricted and defeated.³

Consignee
with a lien.

Thus, where the general agents of the consignor, on refusal of the consignees to accept the goods, retained the bills of lading in their own hands, and accepted drafts on account of the consignment to the amount of 300%, they were held to have an insurable interest to the amount of their acceptances, because "a debt which arises in consequence of the article insured and which would have given a lien upon it, does give an insurable interest."⁴

Wolff v.
Horncastle.

The house of De la Torre, in Spain, consigned a cargo of wool, with the bill of lading indorsed to the firm of Dubois & Son, in London, directing them to hold part of it for Messrs. Hill & Co. of Exeter. Hill & Co. had given no

Hill v.
Secretan.

¹ Hibbert v. Carter, 1 T. R. 745.

² Ante, p. 77.

³ Knox v. Wood, 1 Camp. 542;
McSwiney v. Roy. Ex. Ass. Co., 14

Q. B. 646; Halhead v. Young, 6
E. & B. 312; 25 L. J. (Q. B.) 290.

⁴ Per Buller, J., in Wolff v. Horn-
castle, 1 B. & P. 316, 323.

orders for the wool, but De la Torre & Co. were indebted to them in the sum of 500*l*. The Court held that, under these circumstances, Hill & Co. had clearly an insurable interest in that part of the wool which was to be held for their benefit, and might recover under a count averring the interest to be in them.¹

Secus, where there is no lien.

But, in the United States, where the consignor directed the consignees to hold, not the goods, but the proceeds of the goods, to the use of his creditor, this was held not to give the creditor an insurable interest in the goods,² on the assumption, it would seem, that he could not under these circumstances have claimed possession of them.

Under a lien, both debtor and creditor may have an insurable interest.

It has been held in the United States, that where one takes a bill of lading to secure advances of money on a shipment of goods, and makes out the invoice in his own name, the shipper of the goods has still an insurable interest in them to their full value.³ Of course the right to recover in case of loss, could not be co-extensive with both policies. It follows upon the principle involved in this decision, that any creditor, to whom goods are consigned as a collateral security, has an insurable interest in them to the amount of his debt.⁴

Pledgee of Consignee.

So where the bill of lading is pledged by the consignees of the goods as a security for advances to them, the pledgee has an insurable interest in the goods; and may sue in his own name on a policy effected by his instructions "for account of whom it may concern," and deposited with him as an additional security.⁵

Consignee as Trustee.

There is no doubt that a trustee, having the legal interest in the chattel, may insure to the full value of the goods.⁶

¹ Hill v. Secretan, 1 B. & P. 315.

² Murray v. Columbian Ins. Co., 11 Johnson's Rep. 302.

³ Locke v. North American Ins. Co., 13 Mass. Rep. 61; 1 Phillips, no. 286.

⁴ Wells v. Philadelphia Ins. Co., 9 Serg. & Rawle, 103; 1 Phillips,

no. 292.

⁵ Sutherland v. Pratt, 12 M. & W. 16.

⁶ Per Lord Eldon, in *Lucena v. Craufurd*, 2 B. & P. N. R. 324; *Waters v. Monarch Life Ass. Co.*, 5 E. & B. 870; 25 L. J. (Q. B.) 102.

Two British ships, *The Ross* and *The Atlantic*, having with their cargoes been captured by the Spaniards, the plaintiffs, owners of *The Ross*, together with the owners of *The Atlantic* and the proprietors of their cargoes, gave a joint authority to Cowan to endeavour to obtain restitution. Cowan, by giving up part of the cargoes to the captors, obtained restitution *en masse* of the ships and the residue of the cargoes as for all concerned. His bills on the plaintiffs for his general expenses were accepted and paid by them; and his consignment to them of the whole of the property was followed up by their effecting policies, among other subjects, on *The Atlantic*, of which they were not originally owners. Upon a declaration on this insurance on *The Atlantic* averring interest in them, Lord Ellenborough and the rest of the Court held, that they had a clear insurable interest in this vessel, as the whole of the property had been redeemed *en masse* and consigned to them under lien for advances of money by them to secure the whole concern.¹

Robertson v.
Hamilton.

It must be received then, as a general principle, that consignees of goods, being under advances to the consignors, or under liabilities, *e. g.*, by acceptances for them, may insure in their own name and on their own account, to the full value of the goods, and apply the proceeds of the policies to their own benefit, to the extent of such claims, holding the residue in trust for the consignors, if it was intended when effecting the policies to cover their interest also.²

An exception to this general principle was supposed to have been established by an English decision that identified the consignor with his own government, so as to make the act of the government an estoppel against him in seeking to recover on the policy. A cargo of American produce had been put on board by an American firm under consignment to an English house, when an embargo was laid upon it by the United

Supposed
exception.

Conway v.
Gray.

¹ Robertson v. Hamilton, 14 East, 522.

² See, in addition to the cases already cited, Carruthers v. Sheddon, 6

Taunt. 14. The same position is established in the United States, De Forrest v. The Fulton Ins. Co., 1 Hall's Rep. 84, cited 1 Phillips, Ins. no. 311.

States government. Meanwhile a policy on the goods had been effected by the English house for the consignor with English underwriters; and after abandonment, in consequence of the embargo, an action to recover for the consignor was brought by the English house on the policies; but the Court held that the consignor must be identified with his government, and could not recover against the English underwriters.¹

Considered
in *Aubert v.*
Gray.

This decision has since been examined in the Exchequer Chamber in a case of detention by the Spanish government, at the time in a state of amity with the government of the insurer, and in so far as the case of *Conway v. Gray* purports by a rule of law to identify *generally* the assured with his own government so as to estop him by their acts, it is overruled. The principle, if there be any such, is not applicable unless it be during a war between the governments of the assured and insurer.²

Mortgagor
and mort-
gagee.

We have seen that a creditor with a lien on property for his claim, has an insurable interest to the same extent. It follows that a mortgagee of ship or goods has a distinct insurable interest in the mortgaged property, and may recover on a policy effected for his benefit, averring the interest to be in himself, to the full amount of the mortgage debt. At the same time, the equitable title that still remains in the mortgagor is in him an insurable interest which he may protect by a separate policy. A factor resident in this country, to whom goods and freight have been mortgaged by his foreign principal for advances, may, upon consignment to himself of the goods with the bill of lading indorsed, insure the legal interest in the property on his own account, and the equitable interest for account of his principal.³

¹ *Conway v. Gray*, *Conway v. Forbes*, *Maury v. Shedden*, 10 East, 536. in error, id. 169; 32 L. J. (Q. B.) 50.

³ Per Ashurst, J., *Smith v. Lascelles*, 2 T. R. 187, 188.

² *Aubert v. Gray*, 3 B. & S. 163;

Although the ownership of the mortgagee is distinguished on the register from the absolute ownership,¹ the mortgagee of a ship may nevertheless protect his interest by a general policy *on ship* in the common form, and this to the full value of the vessel; but only to the extent of his mortgage debt can he recover, unless it appear that in effecting the policy he intended to cover, not his own interest only, but that of the mortgagor also.² How much recoverable.

The amount recoverable under an open policy effected by any person possessed of a limited interest, depends upon the intention, in point of fact, with which the policy was effected; if it was to cover the whole interest, both legal and equitable, the whole amount of the insurance is recoverable by the mortgagee, under trust as to the surplus beyond his own claim to hold for the mortgagor; if only to cover his own interest as mortgagee, and the insurance is for a greater sum than the mortgage debt, he cannot recover more than the amount of his lien.³ If under such circumstances as are last supposed he have recovered the whole sum in an action on the policy and retains the surplus, that surplus may be recovered back from him by the underwriters.⁴

The mortgagor has clearly an insurable interest in the mortgaged property, and that to its full value; for notwithstanding its loss he is still liable for the mortgage debt.⁵ The mortgagor. And he is not deprived of this interest by the mere circumstance, that in point of form the registered deed of mortgage is an absolute conveyance of the property.

Indeed, at law and in equity⁶ mere form is not allowed, in Courts of Law

¹ See 17 & 18 Vict. c. 104, ss. 66-75.

² *Irving v. Richardson*, 2 B. & Ad. 193; 1 Moody & Rob. 153.

³ So, in *Carruthers v. Sheddon*, 6 Taunt. 14, 17, Gibbs, C. J., told the jury to consider what amount of interest the policy was in fact intended to cover by those who caused it to be effected.

⁴ *Irving v. Richardson*, 2 B. & Ad. 193.

⁵ See *Allston v. Campbell*, 4 Brown's Parl. Cases, 476; *Higginson v. Dall*, 13 Massachusetts Rep. 96, cited 1 Phillips, Ins. no. 286.

⁶ *Hutchinson v. Wright*, 25 Beav. 444; 57 L. J. (Ch.) 834; *Ward v. Beck*, 32 L. J. (C. P.) 113; *Gardner v. Cazenove*, 1 H. & N. 423; *Whitfield v. Parfitt*, 4 De G. & S. 240.

and Equity look to the substantial rights of the parties.

the absence of any express statutory provision to the contrary, to deprive men of their substantial rights when these can be clearly put in evidence. The owner, by a duly registered deed to which he and two trustees were the only parties, assigned six ships to the trustees for securing sums of money expressed to be lent by them, but which in fact was lent by the plaintiffs, and covenanted to insure each vessel in the sum of 1500*l.* at the least, and, on request, to assign the policies to the trustees. He did insure in his own name through a broker who knew of the mortgage, but to whom he misrepresented the object of the insurance. Upon the loss of one of the ships and the bankruptcy of the owner, the plaintiffs obtained a decree in equity declaring their right to the proceeds of the policies, and setting aside the broker's general lien, and the claim of the bankrupt's assignees under the reputed ownership section of the statute.¹

Incorporated companies and their shareholders.

The members of a partnership are at common law joint owners of the partnership property. But a share in an incorporated company vests no ownership of the company's property in the shareholder. This necessarily follows from the legal view of such a body; it is not a mere collection of individuals; it is a constituted person, a creature of the law, empowered by the law for certain purposes and to hold property; consequently the shareholders cannot in any legal sense be called the proprietors. The effect of this doctrine was somewhat severely tested in connection with the Ship Registry Acts. A Company had been incorporated for the purpose, among other things, of owning British ships, and, contrary as was thought to our national policy, one of the shareholders was a foreigner. Whether such a Company, while one of its shareholders was an alien, could be the registered owner of British ships, was a question raised in the case of the Collector of Customs at Liverpool, and

¹ *Ladbroke v. Lee*, 4 De G. & S. 106.

solemnly determined in the affirmative on the general doctrine of our common law, that the shareholder was in no legal sense an owner of the ships held by the Company.¹

The consequence is, that the insurable interest in the Company's ships or goods is in the Company itself and not in the individual shareholders. A policy "on one 1000*l.* share in the Atlantic Telegraph Company, said share valued at 1100*l.*" would have been invalid, on the ground that the subject of insurance was not capable of exposure to the perils insured against. And yet if this was an incorporated Company, it was the only property which vested in the shareholder. The next clause, however, saved him from this objection, but subjected him to another quite as fatal. It was "in case of loss, the part saved to be sold or appraised for the benefit of the underwriters." In the light of this clause the Court construed the policy as being on the telegraph cable itself, which was exposed to sea risks; but if there had been a plea on the record traversing the interest of the assured, it is not conceivable that he could have recovered against the underwriter unless it were the premium.²

The object intended, but not attained in that policy, was accomplished by apt words properly applied in a policy referred to already in this chapter, which was held to be a policy not on the shares of the shareholder, nor on the Company's property, but on the shareholder's expected profits on the adventure of laying the Company's cable across the Atlantic.³

By the contract of bottomry, if the ship be lost, the lender loses all his money; but if the ship arrive in safety, then he receives back his principal, and also the premium or maritime interest agreed upon. Such a lender has a lien on the ship, and consequently an insurable interest in her, and accordingly

Lenders and
borrowers on
bottomry and
respondentia.

¹ Reg. v. Arnaud, 9 Q. B. 806.

³ Wilson v. Jones, L. R., 1 Exch.

² Paterson v. Harris, 1 B. & S. 193; 2 Exch. 139; ante, p. 58.
336; 30 L. J. (Q. B.) 354.

money lent on bottomry may, when so described, be the subject of marine insurance.

Simonds v. Hodgson.

The insurable interest of the lender in these cases will depend upon the validity of the bottomry bond, as an instrument of hypothecation making the payment of the money contingent on the arrival of the ship. Where the words of the instrument were "after my arrival at the port of London," the Court of King's Bench, reversing the judgment of the Court of Common Pleas, held that the words "my arrival" must be taken to mean, not the personal arrival of the master, but the ship's arrival, and the next clause "whether she do or do not arrive in the port of London," to mean, not "whether she be lost or not," but "whether she arrives in the port of London or some other port;" and consequently that it was a valid instrument of bottomry.¹

Stainbank v. Fenning.

The master of a ship which had put into a foreign port of distress to refit, borrowed money of a merchant there for necessary repairs, to secure which he drew bills on his owner, and executed also what purported to be an hypothecation of ship, cargo, and freight; but as this instrument made the money payable in any event, the lender was held to have no insurable interest.²

The borrower on bottomry and respondentia has no insurable interest in the property hypothecated except in so far as the value of such property exceeds the amount for which it is hypothecated. If hypothecated to its full value, he obviously is not concerned for its safety; for if it arrives, it goes to satisfy the debt; and if lost by perils within the meaning of the bond, the borrower is discharged.

Respondentia is a loan upon the goods, to be repaid to the lender together with maritime interest if the goods arrive; not to be paid if they are lost; the insurable interest, therefore, of the lender on respondentia, stands on the same

¹ *Simonds v. Hodgson*, 6 Bing. 114; in error, 3 B. & Ad. 50.

² *Stainbank v. Fenning*, 11 C. B. 51; *Stainbank v. Shepard*, 13 C. B. 418.

footing with that of the lender on bottomry, viz., that he has a direct interest in the arrival of the goods.

We have seen in a previous chapter¹ that the master has an insurable interest in his wages, and may effect a policy on these and on any commissions he is properly entitled to.² Master and
mariners.

It seems that in the United States, the Courts regarding him in the relation of a confidential agent, have held that if he buys on his own account ship or cargo, when sold in case of misfortune abroad, he has no insurable interest therein unless the purchase be ratified by those whom it may concern.³ The mind is easily reconciled to this state of the law in view of the facts touching the sale and repurchase of the American vessel *Fanny & Elmira* by her master in Ireland.⁴ Moreover, assuming the sale to have been justifiable, the purchase by one sustaining such confidential relations must yet appear in everything to be fair and reasonable, and in nothing to be open to suspicion of dishonest or dishonourable advantage on the part of such a buyer, otherwise it is every way in accordance with the principles of an English Court to expect that the contract would be declared void, and the policy in case of loss assigned under decree to those who held the true interest of ownership.⁵ Master.

It is still believed to be the law of this country, notwithstanding a considerable change of policy very much in favour of ordinary seamen, that these or any officer under the master cannot insure their wages.⁶ In view of principle indeed, these, no less than the master, have an insurable interest in Seamen.

¹ Ante, p. 45.

² *King v. Glover*, 2 B. & P. N. R. 206; and see *Hawkins v. Twizell*, 5 E. & B. 883; 25 L. J. (Q. B.) 160.

³ *Copeland v. Mercantile Ins. Co.*, 6 Pickering, 198; *Barker v. Marine Ins. Co.*, 2 Mason, 369.

⁴ *The Fanny & Elmira*, Edw. Ad. 117.

⁵ As to the general principles, see

Gresley v. Mousley, 4 De G. & J. 78; 28 L. J. (Ch.) 620; *Hobday v. Peters*, 28 Beav. 349; 29 L. J. (Ch.) 780; and as bearing on this officer, *Gardner v. McCutcheon*, 4 Beav. 534; *Thompson v. Havelock*, 1 Camp. 526; *Diplock v. Blackburn*, 3 Camp. 43.

⁶ See ante, p. 44, and *Webster v. De Tastet*, 7 T. R. 157; *The Lady Durham*, 3 Hagg. Ad. 201; 1 Emerig. c. viii. s. 10, p. 235.

wages, but policy is still supposed to stand between them and this reasonable security: and such policy extends with no less force to the expectation of a share of the proceeds, for instance in a whaling adventure.¹

Seamen's
merchandise,
by American
law.

Perhaps when the animal produce of a whaling adventure is got on board, the same objection to the seaman's insuring his share would not apply, and for the same reason for which in the United States he is allowed to insure any goods put on board by him as merchandise, notwithstanding the freight of these be a perquisite and so form a part of his wages.²

Supercargo's
share.

It is even allowable in that country for a supercargo who is to be remunerated by a share of the cargo, to insure his interest on board.³ But the most curious refinement in their law in this matter is that it recognizes the ordinary seaman's expectation in a whaling adventure on terms of sharing in the result, to be such an insurable interest as that another (in the particular case it was the owner of the ship) may make advances (*e. g.*, by outfit supplied from a stock put on board) on security of it and cover it by an insurance.⁴

The policy of
this.

This very obviously shows that policy and not principle stands between the ordinary mariner and what, amidst the risks of his hazardous vocation, is so desirable a security. Philanthropists on shore regret the thriftlessness usually exhibited by those employed in this calling, and yet assist to shut out all hope of amendment by consenting to a state of the law that subjects their just remuneration to the uncertainties of a lottery. Whilst the same misconduct which now forfeits his wages must necessarily be an implied forfeiture of any insurance upon them, if such an insurance were lawful; such a security against the accidents of his gallant enterprise would have no effect in diminishing his fidelity and zeal, and much improvement in steadiness and

¹ Webster *v.* De Tastet, 7 T. R. 157.

² Galloway *v.* Morris, 3 Yeates, 445.

³ Robinson *v.* New York Ins. Co., 2 Caines, 357; *id.* 1 Johnson, 616.

⁴ Hancox *v.* Fishing Ins. Co., 3 Sumner, 132.

forethought might be expected from it should the practice to insure become a habit.

The insurable interest of captors, prize agents, and other Captors, prize agents, &c. such in captured property, has been the subject of very elaborate and refined discussion in the English Courts. The first case in which the question arose was that of *Le Cras v. Hughes*, before Lord Mansfield, generally known in insurance law as the *Omoa case*. A detachment of the sea and land forces of Great Britain, under the respective commands of Captains Luttrell and Dalrymple, jointly captured the fort of Omoa, and two Spanish register ships then lying under its protection. One of the ships, *The St. Domingo*, together with her cargo, was insured on account of the officers and crews of the ships under Captain Luttrell "at and from Omoa to London," and was lost on her homeward voyage by the perils of the sea. An action being brought on the policy, averring the interest to be in the officers and crews of the ships, two questions were made,—1. Whether the sea officers had an insurable interest under the then Prize Act (19 Geo. 3, c. 67); and 2. Whether possession of the ship would entitle them to insure upon the bare contingency of a future grant from the Crown.

The consideration of the second question became unnecessary, except speculatively, for, upon the first, Lord Mansfield was clearly of opinion that the officers and crew had an insurable interest under the Prize Act. The objection on this point being, that the capture was not a sole capture by the sea forces, but a capture by the land and sea forces jointly, Lord Mansfield said, "The Act gives to the officers, seamen, marines and soldiers on board every ship of war, the sole property in all ships and goods which they shall take during war; after condemnation, it does not require that the seamen only shall take; where soldiers assist, their right may be doubtful, but that does not lessen the right of the navy."¹

¹ *Le Cras v. Hughes*, 1 Marsh. Ins. 105; 2 Park, Ins. 568; 3 Doug. 81.

When their right is a mere expectation.

"As to the second ground," Lord Mansfield proceeded to say, "the Crown always makes the grant, and there is no instance to the contrary. Here the possession is in the assured, and a certain expectation of receiving the property captured from the Crown, which gives him an interest in its arrival."¹

The position thus advanced by Lord Mansfield, "that possession, coupled with the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounts to an insurable interest," has been considerably shaken by the observations of succeeding, and scarcely less eminent Judges. "If the *Omoa* case," says Lord Eldon, in *Lucena v. Craufurd*, "was decided upon the expectation of a grant from the Crown, I never can give my assent to that doctrine. That expectation, though founded on the highest probability, was not interest, and it was equally not interest whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of his Majesty to give or withhold, could not belong to the captors so as to create any right in them."² Lord Ellenborough, in *Routh v. Thompson*,³ and Tindal, C. J., in *Devaux v. Steele*,⁴ both seem to consider that, after these observations of Lord Eldon, the doctrine of Lord Mansfield, if it can still be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances.

Result of the authorities.

If the law, therefore, on this subject be that possession coupled with the expectation of a future grant from the Crown, gives an insurable interest, it is so only in cases where a long and uniform course of practice can be shown for the

See the judgment of Lord Ellenborough in *Routh v. Thompson*, 11 East, 433, 434. That captors of a prize in case of joint capture have an insurable interest in such prize under the 45 Geo. 3, c. 72, was held in

Stirling v. Vaughan, 11 East, 619.

¹ *Le Cras v. Hughes*, 3 Doug. 81.

² *Lucena v. Craufurd*, 2 B. & P. N. R. 323.

³ 11 East, 434.

⁴ 6 Bing. N. C. 358, 370, 371.

Crown always to make such grant, and no instance can be given to the contrary.

Lord Eldon, while dissenting from this doctrine, pointed out other grounds on which the right of the captors to insure might have been put. "The captors," said his Lordship, "not only had the possession, but a possession coupled with the liability to pay costs and charges, if they had taken possession improperly, and also a liability to render back property which should turn out to be neutral."¹

It was upon this very ground that Lord Kenyon had previously rested the insurable interest of captors. In the year 1797, three English captains had taken the ship *Westcapelle* and her cargo, as a Dutch prize, and by their agents had caused insurance thereon to be made on their account. The ship and cargo were afterwards claimed on behalf of Theodore Lynam and other American owners, to whom, by a decree of the English Court of Admiralty, they were ultimately restored, with the exception of a small part of the cargo which was condemned as enemy's property. The captors upon this claimed a return of premium in respect of the ship and such part of the cargo as had been decreed to be restored; but the Court refused their claim, Lord Kenyon saying, "the assured had possession of the captured property, and from that possession certain rights and duties resulted. If it was a legal capture, the captors were entitled; if the capture was improperly made, they were liable to be called to account in the Courts of Admiralty, where they might be amerced in damages and costs. It was important to them to take care that there should be something forthcoming to answer the amount of these damages; on this ground, therefore, I am clearly of opinion that the assured had an insurable interest."² Consequently, the policy having attached, there could be no right to a return of the premium.

Boehm v.
Bell.

The next case was that famous one of the Dutch commissioners, which for more than eight years was litigated in the

¹ 2 B. & P. N. R. 323.

² Boehm v. Bell, 8 T. R. 154, 161.

English Courts of Law, and in the House of Lords gave rise to one of the most elaborate and ingenious legal discussions ever raised upon a point of maritime law.¹

Lucena v.
Craufurd.

The facts of the case were as follows:—Holland having been, in the course of the year 1794, overrun and occupied by the armies of the French Republic, with which we were then at war, and it appearing highly probable that her subjection to French power might be permanent, our government, by an Order in Council of February, 1795, directed that all Dutch ships bound to and from the ports of Holland should be seized for the purpose of being brought into this country and there provisionally detained. With a view to provide for the custody of the ships that might be brought in under this order, an Act was passed empowering his Majesty in council to appoint commissioners for the care, management, sale, or other disposal, according to his Majesty's instructions, of all Dutch ships or cargoes "which have been, and might be thereafter detained in or brought into the ports of the United Kingdom"; and on the 15th June, 1795, a commission issued, under this Act, to Craufurd and others, appointing them to act as commissioners for the purpose specified in the Act (*i. e.*, for the disposal, under directions from the Privy Council, of such Dutch property as should be detained in or brought into British ports). Before this commission was issued, Captain Essington, of *The Sceptre* man-of-war, in company with some East India Company's ships, acting under the Order in Council of February, 1795, had captured a fleet of Dutch merchantmen, homeward bound from the African coast and the East Indies, and carried them into St. Helena, for the purpose of being brought into this

¹ A policy on the case came before the Court of King's Bench under the name of Craufurd v. Hunter, in 1798, 8 T. R. 13. The case under another policy again appears before the Exchequer Chamber as *Lucena v. Craufurd*, in 1802, 3 B. & P. 75; and before the House of Lords under the

same name, in 1806, 2 B. & P. N. R. 269. It then came before Lord Ellenborough at the sittings after Michaelmas Term, 1806, on the *venire de novo*, and was ultimately disposed of by the House of Lords on the 29th June, 1808, as *Lucena v. Craufurd*, 1 Taunt. 324.

country. Accordingly, on the 2nd of July, four of these ships, *The Hooghley*, *The Dordrecht*, *The Surceance*, and *The Zeelelye*, sailed from St. Helena with their Dutch cargoes on board for this country; and on the 22nd of August,¹ Craufurd and his co-commissioners, having received notice to that effect, caused an insurance to be effected on these ships and their cargoes on their own account, under the name and style of "The Honourable Commissioners for the sale of Dutch property." All the four ships thus insured, together with their cargoes, were totally lost before arriving in this country; one of them, however, *The Zeelelye*, was not so lost till after the 15th of September; this date is important, because on that day a proclamation of reprisals, in other words, an open declaration of war, was made by his Majesty against the ships, goods, and subjects of the United Provinces.

*Lucena v.
Craufurd.*

On the loss of the ships becoming known, Craufurd and his co-commissioners brought an action upon the policy, averring the interest, in the first count of the declaration, to be in themselves, "as such commissioners;" in the second count, to be in the Crown. The main question in the cause was whether the plaintiffs, under the circumstances, had an insurable interest, under the commission, in the ships and cargoes insured, before their arrival in this country.

It would be impossible to report at length, and useless to attempt to abridge, the able and ingenious disquisitions to which this question gave rise; the reader must be referred to the reports at large, especially to the judgment of Chambre, J., in the Exchequer Chamber;² of the same learned Judge,³ of Lawrence, J.,⁴ and of Lord Eldon,⁵ in the House of Lords.

In the Court of King's Bench, Lord Kenyon and the rest of the Court held that the plaintiffs had an insurable interest sufficient to sustain the first count of the declaration, either

¹ 1 Taunt. 329.

⁴ Ibid. 300-307.

² 3 B. & P. 99-105.

⁵ Ibid. 315-326.

³ 2 B. & P. N. R. 298-300.

*Lucena v.
Craufurd.*

as trustees for the Crown or for the parties who should ultimately be entitled; either as consignees, or as prize agents; and judgment accordingly was given for the plaintiffs for the whole sum. In the Exchequer Chamber this judgment was affirmed by a majority of the Judges, including Heath, J., and Lord Alvanley: Chambre, J., delivering a very forcible opinion the other way.

The grounds on which the majority founded their judgment were substantially the same as those which had prevailed with the Court of King's Bench; and rested on the principle, "that an inchoate interest though imperfect till a given contingency shall take place, is nevertheless insurable."¹

Chambre, J., on the other hand, rested entirely on the fact that, under the terms of the Act and the commission, the powers of the commissioners were strictly limited to the case of Dutch ships actually brought into the ports of the United Kingdom, and provisionally detained there; that, as in this case, the ships had never been brought into this country at all, they had never become the subjects of the plaintiffs' authority or powers under the commission, and consequently that they had no such relation, concern, or interest therein as to entitle them to insure.

Before the House of Lords, eight of the Judges were of opinion, upon the same grounds as before, that the plaintiffs had an insurable interest sufficient to sustain the first count; "they had a contingent interest, and, supposing the intentions of the Crown to remain unaltered, nothing stood between them and the vesting of that contingent interest but the perils insured against."²

*Judgment of
the House of
Lords.*

Chambre, J., adhered to his former opinion, which was supported by Lawrence, J., by the great authority of Lord Eldon, by Lord Erskine, and, as is inferred rather from the known course of his subsequent decisions than from anything that fell from him at the time, by Lord Ellenborough.³ To

¹ 3 B. & P. 98.

² 2 B. & P. N. R. 289-298.

³ Chambre, J., 2 B. & P. N. R.

298-300; Lawrence, J., 300-307;

Lord Eldon, 315-326; Lord Ellen-

borough, 327; Lord Erskine, 328.

these learned persons the plaintiffs' claim of interest seemed to have "no other foundation than a mere naked expectation of acquiring a trust, or charge respecting the property, without a scintilla of present right, either absolute or contingent."¹ By the letter of the commission and the statute, they remarked, the plaintiffs' care was confined to ships which had been detained in, or might be brought into, the ports of this kingdom; so that until arrival here, no Dutch property was clothed with those circumstances which designated it as the object of their commission, and made it their duty to interfere in its preservation.² Under these circumstances, they professed themselves unable to conceive of an interest in a thing with which the persons supposed to be interested had nothing to do:³ and Lord Eldon, in particular, declared he could "not point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost, upon some contingency affecting the possession or enjoyment of the party."⁴ Notwithstanding this clear declaration of opinion, their Lordships did not directly reverse the decision of the majority of the Judges.

*Lucena v.
Cranford.*

Upon the advice of Lord Eldon, the case was sent down for a new trial under a *venire de novo*, on the following collateral ground. The declaration of hostilities against the United Provinces took place, it will be remembered, on the 15th of September; and *The Zecelelye*, one of the ships insured, was not lost till after this, viz., on the 20th of September. Damages nevertheless had been assessed at a total sum, in respect of all the ships lost, including *The Zecelelye*. As, however, the House of Lords were most clearly of opinion, that, whatever insurable interest (if any) the plaintiffs, as commissioners, might ever have had, was taken out of them by this declaration of hostilities, which thenceforth vested the ownership of all captured property in the

*Venire de
novo.*

¹ Per Chambre, J., 299.

³ Ibid. 306.

² Per Lawrence, J., 2 B. & P. N. R. 305.

⁴ Per Lord Eldon, *ibid.* 321.

Lucena v.
Craufurd.

Crown *jure belli*, it followed that the plaintiffs had no interest in *The Zeleelye* at the time of her loss, and the finding of the jury, inasmuch as it gave general damages, partly made up of the loss on *The Zeleelye* which ought not to have entered into it, was erroneous.

Final result
of the case.

The cause accordingly came on for trial before Lord Ellenborough on the *venire de novo*, when a verdict was found for the plaintiffs upon the second count of the declaration, which averred the interest to be in the King.¹

Although the House of Lords in this case avoided a decision diametrically opposed to the opinion of a majority of the Judges, yet the subsequent course of our jurisprudence sufficiently shows the influence of this discussion, for since then it has been uniformly adverse to the assertion of insurable interest, whenever in the case there was nothing but mere expectation.²

Routh v.
Thompson.

Thus, to confine ourselves to cases of capture, a Danish ship, in pursuance of an Order in Council of September, 1807, by which all Danish ships were directed to "be detained and brought into port," was seized by a British privateer and carried into Lisbon; whence, after repairs, and sale of her original cargo, she was freighted with another cargo, and sailed for London on the 3rd of November, the very day that a formal declaration of hostilities had been made by Great Britain against Denmark. The ship and cargo were totally lost.

In an action on the policy, interest was averred in the captors, which it was contended they had on two grounds,

¹ 2 B. & P. N. R. 329. A bill of exceptions was taken to his Lordship's judgment, which was, however, affirmed by the House of Lords, without calling upon counsel in reply, on 29th June, 1801. *Lucena v. Craufurd*, 1 Taunt. 324.

² What it was that was determined by this celebrated case, and the ap-

plication of the rule so determined, was canvassed anew in the case of *Ebsworth v. Alliance Mar. Ins. Co.*, L. R., 8 C. P. 596, by the Judges of the Common Pleas; and the discussion, as the Court was equally divided, ended without result. See ante, p. 79, note 2.

—1, because they had a possession, coupled with a well-grounded expectation of a grant from the Crown; and 2, because such possession rendered them liable, either to the Crown, or to the foreign owner, for the safe custody of the ship, and therefore gave them an interest in her safety.

As to the first, it was answered that the ship was taken, not as a prize of war, but merely under an Order in Council, "to detain and bring into port;" that even if the ship had arrived in safety, the captors would have had nothing "but the chance of a grant;" the Court accordingly held, that they had no insurable interest on this ground, seeing "a man has no right to an indemnity merely because he has lost the chance of receiving a gift."

A mere chance not an insurable interest.

As to the second ground, being, in fact, the foundation of Lord Kenyon's decision in *Boehm v. Bell*, which was approved of by Lord Eldon in *Lucena v. Craufurd*, it was held by Lord Ellenborough to be inapplicable to the present case; because a formal declaration of hostilities had intervened before the loss, at once vesting the right of ownership in the Crown, putting an end to all claim on the part of the foreign owners, and freeing the captors, as agents for the Crown, from all liability for acts done within the scope of their authority, which it did not appear that they had in any degree exceeded. As, however, there was no fraud in the captors in effecting the policy, nor anything illegal in the voyage or insurance, the assured were held entitled to recover back the premium.¹

The captors, however, have an insurable interest in ships taken as prize before condemnation, in case the Prize Act (*e. g.*, 45 Geo. 3, c. 72, s. 3) vests the property, subject only to the right in the Crown to release the prize, and to the effect of a sentence of the Court of Admiralty restoring it to the owners.²

Secus, of a vested right.

The Crown has in all cases an insurable interest in ships lawfully detained and captured under the laws of war; and

Interest in the Crown.

¹ *Routh v. Thompson*, 11 East, 428.

² *Stirling v. Vaughan*, 11 East, 619.

Express ratification not necessary.

if an insurance be effected for the captors *and such as it may concern*, although the captors have no insurable interest in the prize, yet being in possession of it as the servants and agents of the Crown, the Crown by subsequent ratification may adopt the policy.¹ It would seem by what fell from the Court in the case of *Stirling v. Vaughan*, and on the principle that the law presumes, in the absence of anything to the contrary, that a person accepts what is for his benefit, that the captors in every case of legal capture have an implied authority to insure on behalf of the Crown, and may, therefore, in all such cases recover on a count averring the interest to be in the King, without any *express* subsequent ratification by him.²

Uniformity of practice to grant in accordance with an expressed intention.

Contrary therefore to the position of Lord Mansfield in the *Omoa* case, and in accordance with the principle since established, it was held under a policy on behalf of certain French shipowners "on bounty to be allowed by the French Government on the tonnage" of a South Sea whaler, that the expectation of a bounty from Government must be regarded as a mere contingency, and was not an insurable interest.³

Law in the United States.

The law of the United States as to this subject seems to be in accordance with our own, that an insurable interest in prizes can be acquired only by an actual grant from the Government.⁴

Carriers as insurers.

An inland carrier by water may be regarded at law as a *common carrier*⁵ and have cast upon him by the custom of the realm the liabilities of an insurer in addition to those of carrier as such; in such a case he has an insurable interest

¹ *Routh v. Thompson*, 13 East, 274, 284, 285; *Lucena v. Craufurd*, 1 Taunt. 324.

² *Stirling v. Vaughan*, 11 East, 623.

³ *Devaux v. Steele, & Bing*. N. C. 358.

⁴ See the observations of Story, J., in the case of *The Joseph*, 1 Gallison, 558; 1 Phillips, Ins. no. 320 et seq.

⁵ Who and what is a common carrier by water, see MacLachlan, Ship. 115-117.

in the goods committed to his care to their full value.¹ One who is not subject to the custom of the realm, though a carrier, may yet by contract undertake the liabilities of an insurer in addition to those of a carrier, and in respect of such liabilities he has an insurable interest in the goods. In such a case it is important for the carrier's customer to know that without a duly stamped policy from the carrier this contract of insurance is invalid and not enforceable;² and that carrier and customer, and their agent or agents, in issuing or effecting such a contract of insurance without a stamped policy are each of them liable to a penalty of one hundred pounds;³ and that brokerage in such a case is not only an illegal charge, but if paid, may be recovered back.⁴

In this case a stamped policy indispensable.

A party interested in cargo alone has no insurable interest in the ship; for the goods may arrive safe, though the ship be lost, and *vice versa*. Hence, where the owners of the cargo effected an insurance "on money expended for reclaiming ship and cargo," "the loss to be paid in case the ship does not arrive" at the port of destination, it was held, that the assured had no insurable interest in the subject insured against the event sought to be provided for by this policy.⁵

Miscellaneous cases.

Owner of cargo has no insurable interest in ship.

A bill of exchange to cover money borrowed for ship's use in a foreign country gives no lien on a British ship.⁶ Without such a lien in that case there is no insurable interest; and any opinion to the contrary advanced by Gibbs, C. J.,

Bills of exchange.

¹ *Crowley v. Cohen*, 3 B. & Ad. 478; *Joyce v. Kennard*, L. R., 7 Q. B. 78; *Stephens v. Australasian Ins. Co.*, L. R., 8 C. P. 18; *Tate v. Hyslop*, 15 Q. B. D. 368.

² 30 & 31 Vict. c. 23, ss. 7, 9, and 12; post, Appendix.

³ *Ibid.* ss. 13 and 14.

⁴ *Ibid.* s. 16.

⁵ *Kulen Kemp v. Vigne*, 1 T. R. 304.

⁶ It seems to be otherwise in respect of a French ship by French law; *Castrique v. Imrie*, 8 C. B., N. S. 405; L. R., 4 H. of Lds. 414. This law was in that case applied by a French Court to a British ship, no doubt erroneously; but as the judgment was *in rem*, it was held binding on the Courts of this country. The remedy, if any, was by appeal to the Cour de Cassation in France.

in the case of *Tasker v. Scott*,¹ seems to be an *obiter dictum* unnecessary to the case before him, in which the only question was whether the plaintiffs had authority to insure, so as to cover the expense of doing so.

Instead of borrowing at *respondentia*, captains engaged in the East India Company's trade had, since the year 1810,² practised the following mode of raising money to pay for their outward investments:—Bills were drawn for the required amount upon the captain's agents in India, payable so many days after ship's arrival outwards; these bills were indorsed to the person making the required advances in this country, and one set left with him; the other set, together with the goods consigned to the captain's agents, was taken out in the ship; and the indorsee of the bills then effected insurance on them for his own benefit. A case at length came before the Court of Common Pleas, in which the indorsee of bills so drawn and insured sued the underwriter, describing them as "bills of exchange," and averring the total loss of ship, goods, and the set of bills on board of her. Best, C. J., held, that upon such policy the assured could recover nothing; the instruments, being drawn on a contingency, were not bills, but so much waste paper; the plaintiffs had lost nothing by them, because they could have recovered nothing upon them; they had, therefore, no insurable interest, because they had nothing at risk.³

Re-insur-
ances.

After an insurance has been made, the underwriter may, by the law and practice of all countries,⁴ have the whole

¹ *Tasker v. Scott*, 1 Marsh. R. 556; *S. C.*, 6 Taunt. 233.

² The practice prior to that date is stated in the case of *Gregory v. Christie*, 3 Doug. 419.

³ *Palmer v. Pratt*, 2 Bing. 185.

⁴ Re-insurances are expressly sanctioned by the law of France, Ord. Mar. liv. 3, t. vi. art. 20, 21; Co. de Comm., art. 342; of Spain, Co. Comm., art. 852; of Portugal, art.

1726; of Russia, Ord. 1847, art. 1135; of Sweden, art. 10, s. 1: Nolte's *Benecke*, vol. i. pp. 216-218, ed. 1851. They are permitted by the German code, 868; and so they are, but apparently not much practised, in the United States, 3 Kent, Comm. 278. The best account of them is to be found in 1 *Emerigon*, c. viii. ss. 14, 15, 16, pp. 252-261. The reader can also consult 3 *Boulay-*

amount at risk (or, as in France, the whole *minus* the premium) re-insured to him by some other underwriter. The object of this is, to enable him to indemnify himself against the consequences of his own act, whenever he finds he has undertaken a risk on imprudent terms or bound himself to a greater amount than he may be able to discharge. If he gives a less premium for the re-insurance than he receives on the original policy, he gains the difference; he gains nothing if he gives the same premium; and suffers a loss, if he gives more, as may sometimes happen, to cover a dangerous risk.¹

Until very recently, this means of protection for insurers was illegal by the law of this country. About the middle of last century this practice of re-insurance, having, in this country, come to be employed as a mode of speculating in the rise and fall of premiums, and being likely to be used as a cover for wager policies, was declared by the 4th section of the 19 Geo. 2, c. 37, unlawful unless the insurer were insolvent, bankrupt, or dead. This was repealed and re-insurances made lawful by the 27 & 28 Vict. c. 56, s. 1; then both enactments being repealed by the existing statute, re-insurance is legal in virtue of the common law; and the law of such a policy is now the law of any other policy, and to be found in the existing statute,² without any necessity for its appearing to be a re-insurance on the face of it.³

Illegal in this country till quite recently.

Re-insurance is a contract of insurance by which the original insurer becomes himself assured in respect of the same subject, upon the same risks, and under the same conditions as are expressed in the original policy.⁴

What is re-insurance.

Paty, Droit Mar. 429-446; 1 Bencke, 281-289; and 3 Kent, Comm. 278-280.

that clause, say to the extent of 5,800*l*!

² 30 & 31 Vict. c. 23, ss. 3, 4, and sched. D.

¹ What must be thought of the unhappy expedient suggested in *Uzielli v. Boston Mar. Ins. Co.*, 15 Q. B. D. 11, by Lord Esher as a shift for evading the grossly erroneous decision of the Lords in *Lohre v. Aitichison*, 4 App. C. 764, on the sue and labour clause, by over-insuring to meet the expenses under

³ Mackenziev. Whitworth, 1 Exch. Div. 36; below, L. R., 10 Ex. 142. By the 19 Geo. 2, c. 37, the policy was required to express that it was a re-insurance.

⁴ See 1 Emerigon, c. viii. s. 14, p. 252; 3 Boulay-Paty, Droit Mar. 329.

The contract of re-insurance is totally distinct from, and unconnected with, the original insurance; the original assured has no kind of claim against the re-insurer; the re-assured remains solely liable on the original insurance, and alone has any claim against the re-insurer.¹

Hence, supposing the original insurer to have become bankrupt, and the assured to have been paid a small dividend out of his estate, the re-insurer is still liable to pay the whole amount of the re-insurance to the trustee of the original insurer, without deducting the dividend; and the original assured has no claim in respect of the money so paid.²

Evidence to recover.

The re-insured recovers only upon the same evidence as must have been produced against himself by the original assured.³

Amount recoverable.

In every country except France the re-insured is allowed to cover, by his re-insurance, the whole amount of the original insurance, without deducting therefrom the premiums of the original insurance, or the premium of the premium.⁴ In France the great authority of Emerigon is in favour of this uniform practice;⁵ but Pothier,⁶ Valin,⁷ Estrangin the learned commentator on Pothier,⁸ and Boulay-Paty,⁹ are all opposed to this view, on the ground that the premium of the original insurance having been already paid to the underwriter, he runs no risk upon it and therefore cannot insure it.

Defence.

The re-insurer is entitled to make the same defence to an action brought against him on the second policy as the original insurer might on the first,¹⁰ and that, notwithstanding

¹ Le premier contrat subsiste tel qu'il a été conçu sans novation ni altération. La réassurance est absolument étrangère à l'assuré primitif, avec lequel le réassureur ne contracte aucune sorte d'obligation; 1 Emerigon, c. viii. s. 14, p. 252.

² Ibid. 253.

³ See *Gledstanes v. The Royal Exch. Ass. Co.*, 34 L. J. (Q. B.) 30; 3 Kent, Comm. 278.

⁴ 1 Benecke, System des Assecu-

ranz, 284; 1 Nolte's Benecke, 212, 213; Cod. di Comercio, art. 456.

⁵ 1 Emerigon, c. viii. s. 14, s. 4, pp. 253-256.

⁶ Pothier, d'Assurance, No. 36.

⁷ Valin, Comment. sur l'Ord., No. 3, tit. vi. art. 20.

⁸ Comment. on Pothier, No. 36, p. 46, ed. Estrangin.

⁹ 3 Boulay-Paty, Droit Mar. 429 et seq.

¹⁰ See *Gledstanes v. The Roy. Ex.*

the first insurer's acceptance of abandonment. Notice of abandonment is held to be unnecessary under a policy of re-insurance.¹

The ordinary sue and labour clause, through a gross misconception of the meaning of its terms, was held inapplicable to the re-insured, where the persons who got the vessel off the rocks, at great expense, were the original insurers, their factors and servants, because, it was supposed, they could not in law be deemed to be the factors and servants of the plaintiffs, the first re-insurers, as against the defendants, the second re-insurers.² The plaintiffs therefore recovered the full sum re-insured on the ship in their favour by the defendants, namely, 1000*l.*, and no more, although the jury had found that an additional sum of 120*l.* represented the sum due on that policy under the sue and labour clause, if that clause had been applicable. But Lord Esher, M. R., expressed his opinion, that if in such a policy, besides a sum equal to the full value of the ship, there had been included an additional sum to cover the amount recoverable under the sue and labour clause, he should not think it a case of over-insurance.³

It has been held in the United States that the amount of loss recoverable on a policy of re-insurance includes the costs of defence against the claim of the original assured, provided the re-insurer upon notice to him insist on the action being defended, or neglect to consent to payment of the loss without contesting it, and the original insurer be justified in defending the action.⁴

Costs of
defence.

Besides re-insurances properly so called, *i. e.* insurances Insuring the

Ass. Co., *supra*. So held in the United States, *New York Marine Ins. Co. v. Protection Ins. Co.*, 1 Story, R. 458.

¹ *Uzielli v. Boston Mar. Ins. Co.*, 15 Q. B. D. 11 (C. A.); *Hastie v. De Peyster*, 3 Caines, N. Y., 190; 2 Phillips, no. 1506.

² *Uzielli v. Boston Mar. Ins. Co.*, *supra*.

³ *Uzielli v. Boston Mar. Ins. Co.*, 15 Q. B. D. 11, 17. See post, Pt. III. c. 2, *Salvage recoverable under the Sue and Labour Clause*; and the observations there made on this decision.

⁴ *Hastie v. De Peyster*, 3 Caines, N. Y., 190; 1 Phillips, Ins. no. 1129.

solvency of
the under-
writer.

effected by one underwriter with another to secure himself, the assured may also, if he pleases, insure the solvency of the underwriter with whom he has effected the policy. As, however, this practice tends greatly to lessen the profits of the voyage by multiplying the expenses, it will not frequently be resorted to in any country, and appears never to have been in use in our own, though it was not in terms prohibited by the statute 19 Geo. 2, c. 37, nor would be illegal at common law.¹ The real reasons of the non-existence of the practice in this country appear to be, as Mr. Marshall suggests, that a double insurance would better answer the end proposed;² or else, as Mr. Benecke thinks, that the same object is attained by the employment of brokers on a commission *del credere*, which involves a guarantie of the underwriter's solvency.³

Not in use in
England.

In France.

The Ordonnance de la Marine⁴ expressly authorized the assured to insure "the solvency of his insurers;" the Code de Commerce omits all mention of this species of insurance,⁵ from which, says Boulay-Paty, it is not to be inferred that the Code prohibits it, but rather regards it as too clearly a matter of right to require any specific authorization.⁶ The same learned author, however, admits that the practice is scarcely ever resorted to in France; and he considers that it ought never to be adopted, except in cases where the solvency of the underwriters is exceedingly doubtful.⁷

Evidence to
recover.

In order to recover upon such an insurance the first insurer must be in default by a legal demand made upon him, but the better opinion of the French jurists seems to be that he need not also be sued to judgment and execution.⁸

¹ 2 Park, Ins. 599, seems to think that it would be void as a wager policy under the statute; but I agree with Mr. Benecke that it would be difficult to discover any satisfactory ground for this opinion. Des Assurances, c. ii. s. 4, tom. i. pp. 286, 287.

² Marshall, Ins. 139.

³ Benecke, ubi supra. See also 3 Boulay-Paty, Droit Mar. 445, 446.

⁴ Liv. 3, t. vi. art. 20.

⁵ Code de Commerce, art. 342.

⁶ 3 Boulay-Paty, 439, 440.

⁷ Boulay-Paty, Comment. on Emerigon, vol. i. p. 259.

⁸ 1 Emerigon, c. viii. sect. 15, p. 258; 3 Boulay-Paty, Droit Mar.

The assured may also effect a new insurance in consequence of the insolvency of the underwriter during the continuance of the risk; for this, though incorrectly called a re-insurance, is not such a re-insurance as alone was contemplated by the repealed provision of the 19 Geo. 2, c. 37, s. 4,—viz., “a contract made by the underwriter to secure himself.”¹

New-assuring after insolvency of underwriter.

The Assignees both of the insurable interest of the assured and of his policy in respect of the same, are effectually protected by such policy in respect of the interest so assigned. This is in virtue of the language of the instrument itself, and the custom of merchants, now recognized by statute.² The blanks in the common printed forms are generally filled up with the names either of the assured himself, or, as is the case in the very great majority of instances, of the insurance agent by whose instrumentality the policy is actually effected. In the latter case, the clause is, “A. B. and Co., as well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all, do make assurance and cause themselves and them, and every of them to be insured,” &c.

The Assignees of the insurable interest and of the policy thereon.

A practice appears to have sprung up in this country in the middle of last century of effecting policies in blank, *i. e.*, without inserting the names either of the party for whom or by whom they were effected.³ In consequence of complaints on the part of the underwriters, an Act was passed in the year 1784,⁴ directing that the name of the person interested, or of his agent, should in all cases be inserted in the policy.

25 Geo. 3, c. 44.

The provisions of this Act appear to have been founded on a misconception of the real nature of the grievance; what

441; contra, Pothier, d'Assurance, no. 33; and Valin, sur l'Ord., liv. 3, tit. vi. art. 20.

¹ Per Lord Mansfield in *Davis v. Gildart*, see Park on Ins. 602.

² 31 & 32 Vict. c. 86, see post,

p. 114.

³ *Pray v. Edie*, 1 T. Rep. 313; see also the judgment of Buller, J., in *Wolff v. Horncastle*, 1 B. & P. 316, 321.

⁴ 25 Geo. 3, c. 44.

the underwriters really wanted was merely to know the name of some one concerned in effecting the policy, no matter whether principal or agent, to whom they could look as a responsible debtor. What the Legislature appears to have aimed at was, as far as possible, to compel a disclosure of the name of the person really interested as principal. And the Courts accordingly interpreted the Act strictly.

Very soon after it was passed an underwriter took advantage of it to evade his contract, on the ground that the agent's name was not inserted, *eo nomine*, as agent;¹ and another policy was held void under the same law, because the names of all the parties interested were not inserted therein.² This was evidently going too far; another statute, therefore, was passed in the year 1787,³ which still remains the law of the land.

28 Geo. 3,
c. 56.

This Act provides that no policy shall be effected without first inserting therein "the name or names, or the usual style and firm of dealing," either—1st, of "one or more of the persons interested;" or, 2nd, of the "consignor or consignee of the property to be insured;" or, 3rd, of the "persons resident in Great Britain who shall receive the order for and effect the policy;" or, 4th, of the "person who shall give the order to the agent immediately employed to effect it."

Construction
of this
statute.

The Courts of Law, giving this Act the most liberal construction, have held,—1, that the general agents to whom a foreign merchant had sent the bill of lading and also bill of exchange drawn on them, had a right in their own names to effect an insurance on the goods, and to recover as "consignees," within the meaning of the Act, alleging that they had effected the policy as agents for the foreign merchant, and availing the interest to be in him;—2, that in consequence of the subsequent ratification of the insurance by their principal they might recover as "persons receiving the order

¹ Pray v. Edie, 1 T. Rep. 313.

16; Cox v. Parry, 1 T. Rep. 464.

² Wilton v. Reatson, 1 Park, 1rs.

³ 28 Geo. 3, c. 56; post, Appendix.

to effect the insurance" within the meaning of the Act;—3, that as the plaintiffs had employed the broker to effect the policy, they might recover under the same count, as "persons giving the order to make the insurance," within the meaning of the Act;—and 4, that as they had accepted and paid a bill drawn by their principal upon them on the security of the bills of lading, they were "parties interested," and to that extent entitled to recover on the second count of the declaration, averring the interest to be in them, and the policy to be on their own account.¹

It is not necessary to add the word "agent" or any other description to the name of the broker in the policy itself;² moreover, an agent for a limited purpose is as much within the Act as a general agent.³ Where the policy was in the names of the parties really interested, but named them merely as the "trustees of Messrs. A. B. & Co.," this was considered as an insertion "of their usual style and firm of dealing" under the Act.⁴

As an instance of ratification, the following case is cited: *Hagedorn v. Oliverson.* A policy made in London through a broker, by orders of Hagedorn, in the usual form, "as well in his own name as for and in the name and names of all whom it may concern," was effected for Schrøder, a foreign merchant, who had given him no previous authority for that purpose, and who did not do any act to adopt the policy till nearly two years after it was effected; and then, long after the loss had occurred, he wrote to Hagedorn "hoping" that he had settled the loss with the underwriters on the policy in question:—such adoption was held by Lord Ellenborough and the rest of the Court to be equivalent to a previous authority to insure.⁵

¹ *Wolff v. Horncastle*, 1 B. & P. 316. See the discussion in *Ebsworth v. Alliance Mar. Ins. Co.*, L. R., 8 C. P. 596; and ante, p. 79, note 2.

² *De Vignier v. Swanson*, 1 B. & P. 346, n.

³ *Bell v. Gilson*, 1 B. & P. 345.

⁴ *Hibbert v. Martin*, 1 Camp. 538.

⁵ *Hagedorn v. Oliverson*, 2 M. & Sel. 479, decided the year after *Bell v. Janson*, 1 M. & Sel. 203, in which the same learned judge had thrown doubt upon the principle here acted upon, whether it was sufficient under the statute.

Of course, ratification of what has previously been done implies knowledge of it. But the party for whom the insurance was intended cannot be presumed, merely from any after authority to insure, to have adopted the previous insurance, unless it be also proved that at the time of giving such authority he knew as a fact that the prior insurance had been made. This is so plain a principle that it requires no authority to enforce; yet it is all that was really decided in the case of *Bell v. Janson*.¹

Result.

Such, then, having been the wise latitude of the interpretation adopted by the Courts, the statute has been reduced to a mere prohibition against policies in blank.

Who are covered by this clause.

Questions have been raised as to the parties who may avail themselves of the very broad and comprehensive terms of this clause. In the first place, it is clear they must be persons who may lawfully be insured. In the next place, they must be persons who, at some time or other during the risk, have an insurable interest in the property, the original parties and their assignees. Beyond this it must be shown, that the person giving the order to effect the insurance either intended it for their benefit, or, at all events, did not intend it exclusively for the benefit of others, having a conflicting or inconsistent interest, but that it was meant to apply generally, so as to cover the interest of those who should ultimately appear concerned; if this be shown, a subsequent adoption of the policy by the parties so intended to be insured, or so appearing ultimately concerned in interest, will be held equivalent to a previous order, and entitle them, under the words of the general clause, to avail themselves of the benefit of the insurance.

The intention of the party directing the insurance to be effected is the test.

The intention, at the time, of the party who directs the insurance to be effected, is the great point to be ascertained in determining whose interests the policy can be applied to protect; and this point is to be ascertained by the verdict of a jury on the evidence adduced in the cause.²

¹ 1 M. & Sel. 202.

Irving v. Richardson, 2 B. & Ad.

² *Grant v. Hill*, 4 Taunt. 380; 193.

Where the intention of the party directing the insurance is to embrace the interests of any person whatever who may ultimately appear to be concerned, there can be no doubt that any person coming within that category, who subsequently chooses to adopt the policy, may obtain the benefit of it. Thus, where a prize agent abroad, who at the time did not know to whom the prize would ultimately pass, wrote directions to this country for the insurance to be made for the benefit of those concerned, and it ultimately turned out that the Crown had an insurable interest, and had adopted the insurance by an Order in Council, it was held that the nominal plaintiffs might recover in an action on the policy averring interest in the Crown alone.¹ In a former action on the same policy, it having been stated as a fact, in the special case on which the argument proceeded, that the policy had been in reality effected on account of the captors, the plaintiffs failed, because the Court were of opinion that the captors had no insurable interest, and they considered themselves precluded, by the statement in the special case, from applying the benefit of the policy to any other parties than those for whom alone it was found to have been effected.²

Routh v. Thompson.

So where a party had insured 3700*l.* on a ship in which he was interested only as mortgagee to the extent of 900*l.*, Lord Tenterden left it to the jury to say, on the evidence, whether they thought he intended by the insurance to cover his own interest only, as mortgagee, or that also of the mortgagor. The jury having found that he meant only to insure his own interest, the Court would not permit the policy to be extended, by virtue of the general clause, so as to cover the interest of the mortgagor.³

Irving v. Richardson.

On the contrary, where an insurance agent, being unable to effect such a policy as the plaintiff required, indorsed the risk on his own general policy, it was held that the plaintiff

¹ *Routh v. Thompson*, 13 East, 274.

³ *Irving v. Richardson*, 2 B. & Ad. 193.

² *Ibid.* 11 East, 428.

could not recover under it, as it had not been effected on his behalf, or even adopted by him as his after the indorsement had been made; the plaintiff was no party to the contract, and consequently could not put it in suit.¹

Result.

The true rule, then, would appear to be, that any party to whom an interest in the property insured "doth, may, or shall appertain," at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, unless it appears from extrinsic evidence that the person directing the policy to be effected intended at the time so to confine the insurance as not to embrace such interest.

Assignment
of sea poli-
cies.

We have already said that an assignee in order to recover on a policy must be assignee not only of the insurable interest covered by it, but also of the policy by which it is covered. A sea policy in its ordinary form, is not an incident of the property insured, so as to follow its transmission from hand to hand during the continuance of the risks; the purchaser of the property insured does not, by the simple fact of such purchase, and without more, entitle himself also to the protection of the policy. The contract of insurance is a personal contract on the part of the underwriter to indemnify the party originally insured against the consequences of the perils insured against; it is not a contract to indemnify any one whatever who may become interested in the subject insured during the continuance of the risks. In order to entitle the purchaser of the insured property to the substantial benefit of the insurance, there must have been an assignment to him of the policy by the party originally insured, or, at all events, an agreement to assign it,² or what in effect is probably the same thing, to hold it for the benefit of the purchaser.

¹ *Watson v. Swann*, 11 C. B., and not in equity; *De Ghetoff v. London Ass. Co.*, 4 Brown's Parl. N. S. 756; 31 L. J. (C. P.) 210.

² The remedy is entirely at law, Cases, 436, Tomlin's ed.

A valid assignment before loss supposes the co-existence of three things at the time of assignment:—(1) an assignable interest within the meaning of the policy in the assignor: (2) the continuance of the risk insured in the policy; (3) an insurable interest in the subject matter of the policy vested in the assignee and exposed to the perils during the risk in the policy.

Conditions of
valid assign-
ment before
loss.

A cargo of linseed was insured from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risk of craft or lighters to and from the brig, each lighter to be considered as if separately insured. Whilst it was on the voyage the cargo was sold in London to the plaintiffs on the following terms:—To be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash, less $2\frac{1}{2}$ per cent. discount, or on seller's option on handing shipping documents, less 5 per cent. The vessel to go to any safe floating port in the United Kingdom. A safe floating port was named. The ship had arrived there in February, and the cargo was being landed in public lighters employed by the plaintiffs, when one of the lighters with her cargo on board was sunk, and would have been a loss within the meaning of the risk in the policy. The policy was assigned to the plaintiffs in the following June, and the assignment indorsed on it in the following October. The plaintiffs sued on it in their own names, but did not recover, because at the time of the assignment the assignor had no assignable interest, the same having ceased by delivery of the goods into the plaintiffs' lighter. Until such delivery the plaintiffs were incapable of an assignment of the policy, since the risk by the terms of the sale note continued to be on the vendors until then, and the same terms negatived any agreement to assign the policy to them, which might otherwise have kept it alive for their benefit when they had become capable of an assignment.¹

¹ North of England Oil Cake Co. v. Archangel Maritime Ins. Co., L. R., 10 Q. B. 249.

Assignee may sue in his own name, or in that of another.

In case the policy be assigned to the person entitled to the property thereby insured, such assignee may now, by statute, sue on the policy in his own name;¹ and after a loss has occurred, an assignment of the policy merely vests in the assignee a right under the statute to sue in his own name for the loss.² He may still, as formerly, sue in the name of the assignor,³ or of the brokers named in it as effecting the policy. In this case, he sues subject to all rights of defence that may be set up against the nominal plaintiff;⁴ and so now, when he sues in his own name by virtue of the statute, he does so subject to those same rights, they being expressly preserved by it to the defendant.⁵

Mode and form of assignment.

Assignment of a policy of marine insurance has been hitherto made either by writing indorsed on the policy, or by delivery merely of the policy with intention to assign it.

¹ 31 & 32 Vict. c. 86, s. 1.

² *Lloyd v. Fleming*, and *Lloyd v. Spence*, L. R., 7 Q. B. 299.

³ *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Gibson v. Winter*, 5 B. & Ad. 96.

⁴ If inequitable defences, such as a release by the nominal plaintiff after assignment, be set up, either the plaintiff may set out the true facts by way of reply; *De Pothonier v. De Mattos*, E. B. & E. 461; *Lyall v. Edwards*, 6 H. & N. 337; or the Court will interfere upon motion to protect the rights of the parties; *Gibson v. Winter*, 5 B. & Ad. 96, and cases cited in the judgment; *Baerman v. Radenius*, 2 Smith's L. C.

⁵ 31 & 32 Vict. c. 86, s. 1. "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the

defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected." The insurer cannot maintain a right to set off a debt due to him from the assignor of the policy, because no such right of set off against an unliquidated claim is given by the Statutes of Set Off, and this statute affecting procedure only, does not alter the law of set off; *Pellas v. Neptune Mar. Ins. Co.*, 5 C. P. D. 34 (C. A.).

The Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25, sub-sect. 6), making choses in action assignable with a complete transfer of remedies to the assignee, does it with this reservation—"Subject to all equities which would have been entitled to priority over the right of the assignee." Notice of the assignment is required by this Act, which is not necessary under the 31 & 32 Vict. c. 86.

The recent statute, whilst giving a form of assignment, neither requires that form to be followed, nor makes indorsement imperative, not even as a condition of taking advantage of its provisions.¹

When the assignment is made by indorsement, this may be put upon the back of the instrument, either at the time of the transfer of the property insured, or at any other time between the making of the policy and the bringing of the action.²

Time of indorsement.

An absolute sale and transfer by the party originally insured of all his interest in the insured property before the loss, incapacitates him, or the party who has effected the insurance for him, from recovering on the policy on his account; nor can he, or the party who has so effected the policy, sue thereon as trustee for the purchaser unless there have been either an assignment of the policy, or something which the Courts will consider as equivalent thereto, or evidence of an agreement between the vendor and vendee that the policy should be kept alive for the benefit of the latter.³

Rights of parties after assignment of the insurable interest.

Thus, where a part owner of a ship, after insurance and before loss, had by bill of sale absolutely transferred his

Powles v. Innes.

¹ 31 & 32 Vict. c. 86, s. 2. "It shall be lawful to make any assignment of a policy of insurance, by indorsement on the policy in the words, or to the effect set forth in the Schedule hereto."

SCHEDULE. *Form of Assignment.* I, A. B., of &c., do hereby assign unto C. D. &c., his executors, administrators, and assigns, the within policy of Assurance on the Ship, Freight, and the Goods therein carried [*or on Ship, or Freight, or Goods, as the case may be*].

In witness whereof, &c.

² In *Sparkes v. Marshall*, 2 Bing. N. C. 761, the assignment was not made till several months after the loss was known. "We are not aware,"

says Tindal, C. J., "of any principle on which a change in the interest after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss," *i. e.*, where there has been an assignment of the policy.

The loss was generally believed in December, 1831, the transfer was made in April, 1832. See the observations of Lord Abinger, 11 M. & W. 10, 12.

³ *Hibbert v. Carter*, 1 T. R. 745; *Delaney v. Stoddart*, *ibid.* 22; *Powles v. Innes*, 11 M. & W. 10; *North of England Oil Cake Co. v. Archangel, Maritime Ins. Co.*, L. R., 10 Q. B. 249; stated *ante*, p. 113.

share to a third party who was an entire stranger to the insurance, it was held that the plaintiffs, who had effected the policy under his directions, could neither recover as his agents under a count averring interest in him—for he had no interest left at the time of loss—nor as trustees for the purchaser of his share, because there were no facts stated in the case to warrant the inference that the policy had been handed over with the bill of sale, or that there had been an order on the broker to hand it over, or any agreement that the policy should be kept alive for the purchaser's benefit.¹

Nothing short of an absolute transfer, however, of the insured property will preclude the party originally insured from recovering on the policy, for the benefit of the transferee, even where there has been no assignment of the policy, and nothing that amounts to it.

A mere pledge of the bill of lading as a collateral security, does not divest the assured of his insurable interest in the property. *Ker*, having consigned a cargo of produce to this country, and directed an insurance to be made thereon by the plaintiffs, his correspondents in London, subsequently, but before the policy was actually effected, assigned the bill of lading over to *Dellprat*: there the Court of King's Bench, on the assumption that the whole property passed by indorsement of the bill of lading, held that the plaintiffs could not recover on the policy;—not as agents for *Ker*, who had passed away all his interest before the policy was effected, nor as trustees for *Dellprat*, to whom there had been no transfer, or, even if it had been valid, agreement to transfer it. Subsequently, however, on affidavits that *Ker* had no intention to pass the property by indorsement of the bill of lading, but only to bind it to the extent of the net proceeds, as a security for *Dellprat's* debt, which debt had since been paid on *Ker's* behalf, a new trial was granted, and on the second trial, the facts appearing to be so, the plaintiffs had a verdict for the whole amount of the loss.²

*Hibbert v.
Carter.*

¹ *Powles v. Innes*, 11 M. & W. 10.

acc. *Allston v. Campbell*, 4 Brown's

² *Hibbert v. Carter*, 1 T. R. 745;

P. C. 476, Tomlin's ed.

If the person directed to insure has neglected, contrary to his duty, to do so, and meanwhile there is an absolute transfer of the property, and subsequently a loss, the principal, who has directed a transfer also of his right under the supposed policy, may sue, for this neglect to insure, as trustee for the transferee.¹

Assignor's
right of
action for
neglect to
insure.

Unless the policy (as is the case in several States of the American Union) imposes such a condition, the consent of the underwriter is never necessary to the validity of an assignment of it.²

Consent of
insurer un-
necessary.

Where a policy is assigned to the purchaser of the insured property, it is usual to indorse on it a memorandum to the effect that "the interest in this policy is transferred" to the purchaser. When a floating cargo (*i. e.*, a cargo at sea) is sold in London, it is generally on what are called "The London Floating Conditions," which comprise the delivery over to the purchaser for his benefit of the policies which have been effected on the cargo, the understanding being that it is insured to the full value, the price paid being all the higher to include the amount paid by the vendor for insurance. If upon such a transaction it be objected by the buyer that the vendor has not performed the conditions of the contract in consequence of delivering over policies apparently short of the full value of the cargo, the question is one depending so much upon fact that it ought to go to the

The London
floating con-
ditions.

¹ *Delaney v. Stoddart*, 1 T. R. 22.

² In *Sparkes v. Marshall*, 2 Bing. N. C. 761, it was found as a fact that the defendants did not assent to the transfer of the property or to the assignment of the policy. This practice of merchants with regard to marine policies accounts for the absence from the 31 & 32 Vict. c. 86, of any such provision as is to be found in the Judicature Act, 1873, requiring notice to be given of the assignment of the chose in action. See *ante*, p. 114, note 5. The

Boston (U. S.) policy contains a clause "that an assignment shall avoid the policy without the previous consent in writing of the assurers;" Duer, vol. ii. pp. 62, 63: the Philadelphia policy, "that no assignments shall be valid unless the premium be first paid or secured to the satisfaction of the underwriters;" *ibid.* pp. 68, 69. By the usage in Boston, if the insurers consent to the assignment, the assignee is entitled to exactly the same extent of indemnity as the party originally insured.

jury.¹ But where a cargo of wheat, still afloat, was sold at a depreciated price, and the vendor indorsed over the policy for so much only as would cover the depreciated price, being part merely of the sum insured in a valued policy, it was held, as a matter of construction on the bought note taken in connection with the existence of the policy at the time of the contract, that the buyer was entitled to the policy for the full sum at which the wheat was originally insured under it.²

Of co-exist-
ing insurable
interests, and
independent
policies.

It is in this place, following closely after those paragraphs in which we have been considering the right to insure correlative or co-existing interests in the same subject, that we ought to advert to an opinion formed under what seems to be mistaken for the sanction of high judicial authority, as to the sum recoverable upon each of such policies irrespectively and independently of the other. For instance, a mortgagor and mortgagee of the same ship may each effect an insurance on the vessel, and, if he pleases, each may cover the vessel to her full value. The sum recoverable under each seems to be such an amount as, when added to the other, would equal the full value of the vessel, or equal their aggregate interest not exceeding such full value. But the other opinion is, that the aggregate amount recoverable under both policies may exceed or even double the value of the ship;³ and this opinion is advanced under colour of the following statement of a case in the books:—

“Goods⁴ were shipped by Meybohm of Petersburg to Amyand of London on an agreement that the proceeds should be applied in satisfaction of a balance due to the latter. Meybohm assigned the bill of lading to Tamesz of Petersburg, to apply the proceeds in satisfaction of a

¹ *Tamvaco v. Lucas*, 1 B. & S. 185; 30 L. J. (Q. B.) 234; in error, 3 B. & S. 89; 31 L. J. (Q. B.) 296.

² *Ralli v. Universal Marine Ins. Co.*, 31 L. J. (Ch.) 207; on appeal,

ibid. 313.

³ 1 Phillips, Ins. nos. 373 and 311; 1 Marshall, Ins. 142 and 102; 1 Arnould (2nd ed.), 352.

⁴ Cited from Phillips, Ins. no. 373.

balance due to him ; the amount due to each being greater than the value of the goods. Insurances were made in London in behalf of each of them to the full amount of the shipment, the underwriters on Tamesz's interest having notice of insurances by other parties. In a suit on the policy for Tamesz, Lord Mansfield and his associates gave judgment for the full amount, on the ground that the insurances were for different parties on different interests, namely, on the respective interests of Amyand and Tamesz, and not on that of Meybohm."

Mr. Phillips, stating the same case elsewhere in the same volume,¹ has it, "that though the bill of lading was indorsed by Meybohm to Tamesz, another Russian, the Court held that Amyand had an insurable interest in the goods." The learned text-writer, by this mode of stating the case, incorrectly, as I hope to show, intimates clearly that in his opinion the Court were prepared to give judgment for Amyand that he also should recover the full amount of his insurance, although thereby double the value of the goods must have been abstracted from the pockets of the insurers.

Upon this it is to be observed, that although there may be co-existing liens to a greater amount than the value of the subject, there cannot be, at the time of the loss, co-existing insurable interests to an aggregate amount beyond that value. If this be so, then beyond such insurable interest the policy ceases to be a contract of indemnity, and the amount thus in excess is irrecoverable. This conclusion is consonant with that which must have been arrived at in a contest for the goods themselves, supposing them to have survived the voyage. Both could not have had them, and if both were interested in them how could such aggregate interests have exceeded the value of the goods?²

¹ 1 Phillips, Ins. no. 311. This very incorrect and unauthorized statement of the case was adopted by Mr. Arnould.

² These observations have since

been in their substance and effect sustained by Mellish, L. J., in *North British and Mercantile Ins. Co. v. London, Liverpool and Globe Ins. Co.*, 5 Ch. D. 569, 583.

What was the state of facts in the case referred to? Had both Amyand and Tamesz co-existing insurable interests in the goods in question? Amyand, *primâ facie* at the moment of the shipment had an insurable interest, and he was justified, therefore, in insuring on his own account. But Meybohm held in his hand the power of diverting the goods from Amyand, and exercised this power by indorsing the bill of lading to Tamesz for a debt greater than the value of the goods. That was the annihilation of any insurable interest held by Amyand, without the intervention of any of the perils insured against, and made his policy thenceforward of no effect. Is this opinion supported or controverted by what is attributed to the Court?

The suit was by Tamesz upon his own policy as for a total loss. Suggestion, however odd it may seem now-a-days, made by the underwriters, defendants, that judgment should go for only half the amount of their policy, because the same goods were fully insured by a co-existing policy at that time in the hands of Amyand. It is implied in this suggestion that Amyand's policy had been made to cover Meybohm's interest, and, consequently, that this and the policy in suit were in effect upon the same interest, and therefore a double insurance. In answer to this, the Court say, not that Amyand had a then existing insurable interest, but that *primâ facie* he had at the time of effecting his policy a lien on the goods, and that it was to cover that lien he had effected his policy; in other words, that it was not available for Meybohm, or any one claiming through Meybohm's interest. This was all that the Court had occasion to say, and all that they do say.¹ As for Amyand's policy, it was then worthless, because his insurable interest was gone.

It only remains to add, that whilst policies, like liens, may overlies the subject, in numbers, to an aggregate amount exceeding indefinitely the value of it, the right to recover upon all of them together in respect of any one loss is

¹ *Godin v. London Ass. Co.*, 1 Burr. 489; 1 W. Bl. 103; 2 Ken. 254.

restricted, by the principle of indemnity that underlies the contract, to the ascertained or agreed worth of the subject.¹

In much that has gone before we have seen that an insurable interest in the subject insured is essential to the validity of the policy. As to property, however, which does not belong to her Majesty's subjects, there is a very important difference. Wager policies, the nature and effect of which regarding British property we shall yet have to consider, were received by our Courts as legal and valid, notwithstanding the instrument on the face of it disclaimed any interest in the property on the part of the assured. The 19 Geo. 2, c. 37, followed upon this, declaring such a policy to be illegal and invalid as regards "ships and goods" the property of her Majesty's subjects. Whether the Act extended to property belonging to aliens was raised as a question in respect of a French ship, and was determined by our Courts in the negative.²

Persons without insurable interest in property not British.

Whatever may have been the motive of the British Legislature for this remarkable exception,—whether it was out of consideration for the expense that must have been incurred in bringing evidence from abroad to prove insurable interest in foreign ships and goods, as is supposed in the case referred to,³ or whether, as is more natural, it was that our government had not the same motive for suppressing a mode of insurance that led to the "fraudulent loss, destruction, and capture of ships and cargoes" belonging to foreigners, the law, unless altered by the 8 & 9 Vict. c. 109,⁴ is now that an insurance on such property is valid in our Courts although there be on the face of the policy a disclaimer of interest.

¹ How this restriction is worked out in the final result of competing claims and actions thereon, may be seen in the case referred to above, 5 Ch. D. 569.

² *Thellusson v. Fletcher*, 1 Doug.

315, A.D. 1780.

³ *Ibid.*

⁴ Sect. 18 is, "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void."

The policy, and the statement of claim on it, must expressly negative interest.

A very important distinction is here to be observed. Since the statute above referred to was passed, it is once more a presumption of English law that every policy of insurance not containing on the face of it a disclaimer of interest in the subject insured is a contract of indemnity on which none can recover who was not possessed of an insurable interest in the property at the time of the loss. It accordingly soon became a question whether a policy, in the common form, and having no words on the face of it to show it not to be an interest policy, could, since the Act, be effected on foreign ships or goods by a party having no interest, and be recovered on by such party without any averment or proof of interest.

Lord Kenyon was disposed to think that it could be; and when the case of *Craufurd v. Hunter* came before him in the King's Bench, in which a policy in the common form had been effected on certain Dutch ships and cargoes, his Lordship and the rest of the Court overruled a demurrer to the fourth count of the declaration, which, after alleging that the ships, &c., did not belong to his Majesty or any of his subjects, omitted all averment of interest.¹ When the question was raised before the same Court in the subsequent case of *Nantes v. Thompson*,² they felt bound by the previous decision, and gave judgment the same way; but, after the famous argument in the House of Lords in the case of *Lucena v. Craufurd*, this judgment of the Court of King's Bench was brought upon writ of error before the Exchequer Chamber and solemnly overruled, and the law upon this point was thereby established to be that every policy which does not on the face of it contain words showing it to be a wager policy must be taken to be a policy on interest; and that no such policy can be validly effected, either on foreign or British ships, except by a party having interest, who in order to recover on it must aver in the declaration and prove at the trial that he has such interest.³

Cousins v.
Nantes.

¹ *Craufurd v. Hunter*, 8 T. R. 13. 385.

² *Nantes v. Thompson*, 2 East,

³ *Cousins v. Nantes*, 3 Taunt. 513.

Of persons who may not be assured there are the three following classes : 1. As to British property, those who have no insurable interest ; 2. As to foreign property, those who insure under a form of policy which implies that they have insurable interest when they have none ; and 3. As to both British and foreign property, those who are alien enemies. We have already treated of the second class, and shall have occasion again to refer to it when treating of the first.

Who may not
be assured.

In treating of the first of these classes we are obliged to offer a brief history of the wager policy.

First. Those
without
insurable
interest in
British
property.

A wager policy is distinguishable by the form of the instrument, as well as the nature of the contract, since the parties to it, by express terms, disclaim, on the face of it, the intention of making a contract of indemnity. Accordingly, by one or other of the following clauses written on the face of it, "Interest or no interest," or "Without further proof of interest than the policy," or "This policy to be deemed sufficient proof of interest," or other similar terms, it purports to bind the underwriter to pay a sum of money irrespective of any interest in the assured ;¹ and as nothing in these cases is actually at risk which can be sea-damaged or abandoned, it frequently also contains the clause, "Free of all average, and without benefit of salvage."

Wager
policies.

Whether such policies were legal at common law is now a question of no moment. It will be sufficient to say, that long prior to the 19 Geo. 2, c. 37, and contrary to the older determinations, they had been held by our Courts to be valid contracts of insurance.² They stood even then contrasted at common law with a policy in the common form, which was,

At one time
deemed legal.

¹ See the judgment of Best, C. J., in *Murphy v. Bell*, 4 Bing. 569—572.

² This point was established by *Assevedo v. Cambridge*, 10 Mod. 77,

A.D. 1710 ; *De Paiba v. Ludlow*, 1 Comyns, 361, A.D. 1721 ; *Dean v. Decker*, 2 Str. 1250, A.D. 1746. They were also recognized as legal by Lord Mansfield.

as it still is, considered to be a contract of indemnity only, upon which the assured could not recover without an interest capable of proof.¹

But about the year 1746, the Legislature, wisely considering it to be against the policy of this country, as a great maritime state, to permit parties who had no interest in the safety of British ships and cargoes to give themselves, by means of these policies, a direct interest in their loss, interfered by the 19 Geo. 2, c. 37, to suppress the practice.

19 Geo. 2,
c. 37.

The preamble of that Act in substance recites that "the making of insurances 'interest or no interest,' or 'without further proof of interest than the policy,' had been found by experience" to be productive of such pernicious practices as the "fraudulent loss, destruction, or capture of great numbers of ships with their cargoes;" the "encouragement of the exportation of wool, and the carrying on of many other prohibited and clandestine trades, which, by means of such insurances, have been concealed;" and the introduction of "a mischievous kind of gaming, under pretence of insuring against the risk on shipping and fair trade." As Best, C. J., observes, "gaming was by no means the sole evil which the Legislature, by this Act, proposed to remedy; but its object also, and perhaps chiefly, was to prevent policies in this form from being 'used to protect persons who were carrying on an illegal traffic, or made the means of profiting by the wilful destruction and capture of ships.'"²

With these views, therefore, the statute proceeded to enact,

¹ For this latter position, see the observations of Lord Eldon in *Lucena v. Craufurd*, 2 B. & P. N. R. 321, dissenting from the dictum of Lord Kenyon in *Craufurd v. Hunter*, 8 T. R. 13, 23, in which that learned Judge had said "that a person at common law might have insured without interest." The position, as stated in the text, was laid down as law by *Chambre, J.*, in *Lucena v. Craufurd*,

3 B. & P. 101, and is now finally established by the judgment of the Exchequer Chamber, in *Cousins v. Nantes*, 3 Taunt. 513, in which the dictum of Lord Kenyon, and the case of *Nantes v. Thompson*, 2 East, 386, founded upon it, were decisively overruled.

² Per Best, C. J., in *Murphy v. Bell*, 4 Bing. 569, 570.

by sect. 1, "That no insurance shall be made on any ship or ships belonging to his Majesty or any of his subjects, or on any goods or effects laden on board such ships, 'interest or no interest,' or 'without further proof of interest than the policy,' or by way of gaming or wagering, or 'without benefit of salvage to the insurer,' and that every such insurance shall be void."

Wager policies on British property void.

The prohibition contained in this section is confined to British, and does not extend to foreign ships and cargoes. Hence, where a policy was effected, after the Act, on goods on board three French ships, "the policy to be deemed sufficient proof of interest in case of loss," this was held not to be within the statute, and therefore good, as a wager policy, at common law.¹

This prohibition not extended to foreign property.

The reason generally given for not extending the Act to foreign shipping is, the difficulty and expense of bringing witnesses from abroad to prove the interest.² But this reason seems inadequate; and a more natural explanation appears to be, that our government had not the same motive for suppressing a mode of insurance that led to the "fraudulent loss, destruction, and capture of ships and cargoes"³ belonging to foreigners, as it had in the case of ships and cargoes belonging to its own subjects.

Whatever might have been the motive, the fact was, that all insurances on foreign ships, and goods loaded on board of them, were left as before, and therefore wager policies, properly so called, continued to be legal still, when effected on foreign ships and goods.

The effect of this contrast was to raise the question, whether a policy, in the common form and having no words on the face of it to show it not to be an interest policy, could, since the Act, be effected on foreign ships or goods by a party having no interest, and be recovered on by such

In such case the policies must negative interest.

¹ *Thellusson v. Fletcher*, 1 Doug. 315, A.D. 1780. *v. Craufurd*, 2 B. & P. N. R. 322.

³ Preamble to 19 Geo. 2, c. 37.

² *Ibid.* Lord Eldon in *Lucena*

party without any averment or proof of interest?—in other words, whether such a policy was legal and available at common law for a person without interest. The decision of the Exchequer Chamber was, as we have seen,¹ in the negative on both points.

The result is, that wager policies, properly so called, that is, which appear on the face of them to be so, might at common law, since the 19 Geo. 2, c. 37, be legally effected on foreign ships, and recovered on without proof of interest; and the law is so still, unless the statute against wagers is to be construed as comprehending this contract.²

Policy not disclaiming interest necessarily implies it.

But other policies not disclaiming interest, so necessarily imply interest at common law, that they cannot be legally effected either on foreign or British ships, except by a party having interest; nor is it possible to recover by action upon them without averment of interest, and proof thereof when that averment is traversed.

Cases on this point.
Kent v. Bird.

Hence, where, in consideration of 20% to be paid to a passenger in the same ship, at the next port she should reach, it was agreed that if she did not save her passage to China, the passenger should pay 1000% within one month after her arrival in the river Thames: this agreement was held void, as being a contract by way of gaming or wagering, within the first section of the 19 Geo. 2, c. 37; notwithstanding it appeared that some goods were on board belonging to one of the parties which were liable to suffer by the loss of the season.³

Lowry v. Bourdieu.

Lowry, having advanced to Lawson, the captain of an East India ship, 26,000% on the security of a common money bond, effected a policy for the amount, which appeared on the face of it to be “on Captain Lawson’s bond for 26,000%.”—in

¹ Ante, p. 122.

² The 8 & 9 Vict. c. 109, s. 18, providing that “all contracts or agreements, whether by parole or in writing,

by way of gaming or wagering, shall be null and void.”

³ *Kent v. Bird*, 2 Cowp. 583.

case of loss no other proof of interest to be required than the bond, warranted free of average, and without benefit of salvage to the insurer,—Lord Mansfield, Ashurst, J., and Buller, J., held, that this was void, as a gaming policy under the statute. “The plaintiffs,” observed his Lordship, “say ‘We mean to game, but we give our reason for it: Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us.’ It was a hedge; but they had no interest: for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson.”¹

Money expended in reclaiming ship and cargo after capture, which is ordered to be a charge on the cargo, does not give the owners of cargo an insurable interest in the ship; and a policy, therefore, which appears on the face of it to be effected on money so expended, “the loss to be paid, if the ship does not arrive, without further proof of interest than the policy, warranted free of all average, and without benefit of salvage,” is a wager policy, and void under the statute.²

Kulen Kemp
v. Vigne.

Any policy which bears on the face of it to be made, Rule. “interest or no interest,” “without further proof of interest than the policy,” or “without benefit of salvage to the insurer,” although perhaps not such as would strictly fall within the description of a gaming or wagering contract, is by the statute void.

A policy of insurance stipulated “that the goods insured were and should be valued at five tierces coffee, valued at 27*l.* per tierce, say 135*l.*, the policy to be deemed sufficient proof of interest,” was held void under the statute, the object of which was to prevent insurances in which the policy was to be proof, not of *the amount*, but of *the existence* of interest.³

Murphy v.
Bell.

¹ Lowry v. Bourdieu, 2 Doug. 468. 304.

² Kulen Kemp v. Vigne, 1 T. R.

³ Murphy v. Bell, 4 Bing. 567.

Profits.

The Act in terms makes mention of "ships and goods" only, but "profits" are substantially an interest in goods, and consequently a policy "on profit on cotton valued at 350%, and in case of loss or accident the said policy to be considered sufficient proof of interest, &c.," was held to be an insurance within the Act, and void accordingly, notwithstanding there was an actually existing interest to the full amount of the policy.¹

Valued policies.

Valued policies were at one time thought to be within the Act, as offering the means of perpetrating frauds in the wilful loss or destruction of ships and cargoes by means of policies which might fix extravagant and fictitious values on the subjects insured. There is a clear distinction, however, between wager and valued policies. If the policy dispenses with all proof of the existence of interest, it is a wager policy and void within the Act; if the policy contains on the face of it no such dispensation, but whilst saving the plaintiff the trouble of proving the *amount* of his interest, leaves him liable to show an insurable interest, it is a valued policy and good.²

If indeed there appears to be an enormous disproportion between the real value of the articles insured and that inserted in the policy as their agreed value between the parties—in the words of Lord Mansfield, "if it should come out in proof that a man has insured 2000*l.* and had interest on board to the value of a cable only"—such over-valuation might be received as evidence of fraud which would avoid the policy.³

¹ *Smith v. Reynolds*, 25 L. J. (Ex.) 337; 1 H. & N. 221. Accord. *Allkins v. Jupe*, 2 C. P. D. 375; 46 L. J. (C. P.) 824; *De Mattos v. North*, L. R., 3 Exch. 185; and *Mortimer v. Broadwood*, 17 W. Rep. (C. P.) 153; in the last case the same ruling prevailed notwithstanding the insurer, without instructions to that

effect, had of his own accord inserted the fatal stipulation "without benefit of salvage."

² *Lewis v. Rucker*, 2 Burr. 1167, 1171; *Murphy v. Bell*, 4 Bing. 567, 572. See the discussion in *Barker v. Janson*, L. R., 3 C. P. 303.

³ *Lewis v. Rucker*, *supra*; *Barker v. Janson*, *supra*.

From this prohibition of all wager policies on British ships and goods, the statute by way of exception provides (sect. 2), "That insurances on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer." The reason of this exception is stated by Best, C. J., to be, "that privateers carry no cargoes, and their crews are composed of more persons than it would be safe to trust with the secret that the ships were to be wilfully destroyed, or purposely exposed to capture."¹

Statutory exceptions.

Sect. 2.

Sect. 3 provides, "That any effects from any ports or places in Europe and America, in the possession of the Crowns of Spain and Portugal, may be insured in the same manner as if the Act had not been made." The reason assigned for this exception by Best, C. J., is that ships going to the territories of Spain or Portugal were not likely to export wool (a thing much dreaded by the English government at the time the Act passed, and expressly mentioned in the preamble as one of the mischiefs that had been encouraged by permitting wager policies), nor other raw materials, or to import any articles that could interfere with the monopoly of British manufactures.² Another, and perhaps more cogent, reason appears to have been the desire to facilitate by this means the smuggling trade, especially in bullion, carried on by our merchants with the Spanish and Portuguese colonies.³

Sect. 3.

Sect. 6 provides, "That in all actions brought by the insured, the plaintiff, or his attorney or agent, shall within fifteen days after he shall be required so to do in writing by the defendant or his attorney, declare in writing what sum or sums he has insured or caused to be insured in the whole, and what sums he has borrowed at respondentia or bottomry for the voyage, or any part of the voyage in question."

Sect. 6.

¹ 4 Bing. 567, 570.

³ Kent, Com. 265. See the case of *Da Costa v. Firth*, 4 Burr. 1966.

² Ibid.

³ 1 Marshall, Ins. 124, note (a);

Wager policies in foreign countries.

It is not only in our own country that insurances by way of wager are held illegal: in France, in Germany, in Holland, in the greater part of the North of Europe, in most of the United States of America, their illegality is equally established by general mercantile usage or positive ordinance.

In France.

In France, though not prohibited in express terms, they have always been held unlawful, as opposed to the spirit of the Ordonnance de la Marine,¹ and the text of the Code Civil.² When the provisions of the Code de Commerce were under the consideration of the French Legislature, an attempt was made to procure the protection of the law for this species of contract, but it was immediately checked by the indignant exclamation of the Imperial orator, that "it was not for a great nation like France to legalize the immorality of gambling contracts (*des paris*)."³

In Germany, Holland, &c.

The legislative prohibition of these contracts in the different maritime states of Holland and the North of Europe may be found in Magens⁴ and in Benecke.⁵ In Germany the prohibition by the German Code is implied rather than expressed.⁶

In Italy, &c.

In Italy they were expressly prohibited by the Ordinances of Genoa and Venice;⁷ in the ports of Tuscany and Naples they were allowed; and they were also practised in Portugal.⁸ By the new Commercial Code of the kingdom of Italy, they are illegal.⁹

¹ Liv. 3, t. 6, art. 22, 23; 2 Valin, 73.

² Code Civ., art. 1965, 1966, which declare all wagers illegal. The Code de Commerce, says Boulay-Paty, cannot be more indulgent on this point than the Code Civil; Droit Mar. tom. iii. 238.

³ See Estrangin, note to Pothier, Traité d'Assurance, p. 14; Boulay-Paty, ubi supra; note by M. Becane to his edition of Valin, tom. ii. p. 285.

⁴ 2 Magens, Ord. of Middleburgh,

p. 70; Koenigsburgh, p. 88; Amsterdam, p. 132; Rotterdam, p. 189; Stockholm, p. 257, &c., under the respective titles of the different states.

⁵ 1 Nolte's Benecke, 240, 241 et seq. In Prussia they are prohibited by the Code, art. 1995, tit. Assurance; ibid. 295.

⁶ German Code, art. 782, Wendt.

⁷ 1 Nolte's Benecke, 240.

⁸ Ibid.

⁹ Codice di Commercio, art. 446, 450.

In the greater number of the United States of America these policies, though not prohibited by positive statute, have invariably been considered illegal.¹ In New York, however, till a very recent period, they were held legal;² but are now prohibited by the revised statutes of that State.³

In the United States.

For the sake of order we here refer to a decision twice already in the course of a few pages adverted to, definitely discriminating the second class of those who may not be assured, namely, persons affecting to contract by policy for an indemnity in respect of foreign ships or cargoes in which they have no insurable interest. Persons so situated may effect a valid policy in respect of such property, provided the policy expressly negative the possession of insurable interest; but in the absence of such express negation any policy effected by them is presumed by our law to be upon interest capable of proof and necessarily averred in the statement of claim; and since *ex hypothesi* they possess no such interest the policy is invalid.⁴

Second.
Those with-
out insurable
interest.

The third class of those who may not be assured, being alien enemies, comprises all persons who by domicile, whether of origin or of acquisition, belong to a state which is actually at war with that of the insurer. This restriction upon insurances for the benefit of such persons is an obvious consequence of that universally recognized principle in the law of nations, that the object of maritime law is the destruction of the enemy's commerce and navigation, directly aimed at his naval power, and indirectly affecting his general resources for war. Marine insurance consequently underwritten by our countrymen upon his property would be a

Third. Alien
enemies.

¹ 1 Phillips, Ins. nos. 5, 7, 211; 3 Kent, Com. 277.

² *Juhel v. Church*, 2 Johnson's Cases, 333.

³ New York Revised Statutes,

vol. i. p. 662, ss. 8, 9, 10, cited in Kent's Com., *ubi supra*.

⁴ *Ante*, p. 126; *Cousins v. Nantes*, 3 Taunt. 513.

frustration of these efforts at our own cost. "Hostium enim pericula in se suscipere, quid est aliud quam eorum commercia maritima promovere?"¹

Supposed
legality of
insuring
enemy's pro-
perty.

It was for a long time, however, an unsettled question in English law, whether the insurance of enemy's property was or was not illegal at common law. Lord Hardwicke, in 1749, said it had never been declared in our Courts to be unlawful;² and Lord Mansfield supported the practice, not apparently upon any principles of law,³ but on fancied grounds of expediency, that the English underwriters would gain more in premiums than they would lose by captures;⁴ but Valin, followed by Pothier and Emerigon, declares that owing to the permission of this practice in England, one part of our nation restored to theirs, by the effect of insurances, what the other part took from them by arms and the rights of war.⁵

Temporary
prohibition by
statute.

The English Legislature afterwards by two temporary statutes, one in 1748,⁶ and another in 1792,⁷ prohibited the insurance of any ships or merchandise belonging to France during the wars then pending with that nation.

Illegality of
it determined
at law.

At length the Courts of Westminster Hall took the whole subject into consideration upon the principles of international law, and established by a long course of decisions under Lord Kenyon, Lord Alvanley, and Lord Ellenborough, that such insurances were not only illegal and void, but repugnant to every principle of public policy.⁸

¹ Bynkershoek, Quæst. Jur. Publ., lib. 1, c. 21.

² Henkle v. Royal Exch. Co., 1 Ves. sen. 317.

³ Buller, J., said that he never could get him to give any opinion as to their legality; Bell v. Gilson, 1 B. & P. 345, 354.

⁴ Planché v. Fletcher, 1 Dougl. 251; Gist v. Mason, 1 T. R. 84; Lavabre v. Wilson, 1 Dougl. 284.

⁵ 2 Valin, liv. iii. t. vi. arts. 3, 39 (he is speaking of the war terminated by the Peace of Paris, 1763); Emerigon, c. iv. s. 9, p. 128. Boulay-Paty

says, that in the present state of French law such insurances are illegal; Comment on Emerigon, vol. i. p. 131.

⁶ 21 Geo. 2, c. 4.

⁷ 33 Geo. 3, c. 27.

⁸ Brandon v. Nesbitt, 6 T. R. 23; Bristow v. Towers, ibid. 35; Furtado v. Rogers, 3 B. & P. 191; Kellner v. Le Mesurier, 4 East, 396; Gamba v. Le Mesurier, ibid. 407; Brandon v. Curling, ibid. 410; M'Connell v. Hector, 3 B. & P. 113; Le Luneville v. Phillips, 2 B. & P. N. R. 97.

"The question is," said Lord Alvanley, "whether it be competent to an English underwriter to indemnify persons who are engaged in war with his own sovereign, from the consequences of that war; and we are all of opinion that, on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such contract is as much prohibited as if it had been expressly forbidden by Act of Parliament."¹

The first two cases in which the question was formally decided, *Brandon v. Nesbitt*, and *Bristow v. Towers*,² proceeded exclusively on the ground that such a contract could not be enforced in our Courts. But in the case of *Furtado v. Rogers*, Lord Alvanley, then presiding in the Court of Common Pleas, laid it down decisively, that insurances effected on behalf of an alien enemy, though made previously to the commencement of hostilities, and therefore legal in their inception, could not cover a loss by British capture after war had broken out; and that no action could be brought upon them in our Courts even after the restoration of peace.³ The language of Lord Ellenborough in condemning these insurances was even stronger than that of Lord Alvanley: he pronounced them to be not only illegal and void, but repugnant to every principle of public policy.

Whether the loss in respect of which the assured sought to recover were a loss by British capture,⁴ or by a co-belligerent;⁵ whether the insurance were effected before or after the breaking out of hostilities;⁶ or whether the action were brought during war or after the restoration of peace;⁷ Lord Ellenborough's decision was uniformly the same; and he declared, that every insurance on alien property by a British

Insurance on enemy's property invalid.

¹ In *Furtado v. Rogers*, 3 B. & P. 191, 198.

² 6 T. R. pp. 23, 35.

³ *Furtado v. Rogers*, 3 B. & P. 191.

⁴ As in *Kellner v. Le Mesurier*, 4 East, 396.

⁵ As in *Brandon v. Curling*, 4 East, 410.

⁶ As in *Furtado v. Rogers*, 3 B. & P. 191; or *Brandon v. Curling*, 4 East, 410.

⁷ As in *Gamba v. Le Mesurier*, 4 East, 407.

subject must be understood with this limitation, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the underwriters.

When, however, it was attempted to extend this principle still further,—to an insurance against British capture of a British ship, the point was not decided, but the Court intimated a pretty clear opinion, that it would only be illegal in the case of a foreign ship.¹

Premiums.

If such a contract of insurance be effected before the commencement of hostilities, it is legal in its inception; and if the risk have once attached on such policy, there can be no return of premium.² If such a policy be knowingly effected after hostilities have commenced, the policy never was valid; but until there is a commencement of the risk under it, the premium may still be recovered back, if the contract has been first duly renounced.³ If an agent in this country innocently effects an insurance for one who has become an alien enemy by the breaking out of hostilities before the policy was effected, the agent being unaware of that fact at the time he procured it, the premium thus paid under a mistake of fact may be recovered back from the underwriter.⁴

Scous, of alien enemy who is licensed to trade.

An alien enemy possessing a licence or privilege to trade, has the right of insuring his property as incident to the right of trading.⁵ Such a licence not only legalizes the commerce, and therefore the insurance by which it is sought to be protected,⁶ but also enables the alien enemy, so licensed, to sue upon the policy, not only in the name of the agent, but in his own.⁷ “Whatever commerce of this kind,” says Lord

¹ Lubbock v. Potts, 7 East, 449.

² Furtado v. Rogers, 3 B. & P. 191.

³ Post, part iii. c. ix.; Palyart v. Leckie, 6 M. & Sel. 290; in this case the plaintiff failed, for want of formal renunciation of the contract.

⁴ Oom v. Bruce, 12 East, 225;

Hentig v. Staniforth, 5 M. & Sel. 122.

⁵ Wells v. Williams, 1 Salk. 45; 1 Lord Raymond, 282, S. C.

⁶ Kensington v. Inglis, 8 East, 273; Conway v. Gray, 10 East, 536.

⁷ Usparicha v. Noble, 13 East, 332.

Ellenborough,¹ "the Crown has thought fit to permit, must be regarded by the Courts of law as legal with all the consequences of its being legal; one of which consequences is, a right to contract with other subjects of the country for the purpose of protecting such property by insurance."

Hence, where a licence to trade with the enemy was given to three persons, two of whom themselves became alien enemies before action brought, it was held that the broker, who had effected the policy for all the three, might, notwithstanding, recover upon it.²

Where the party intended to be insured by the policy does not become an alien enemy until after the loss and the cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities, and revives on the restoration of peace;³ hence, the defence of *alien enemy* in such cases is only a temporary bar of the plaintiff's right to sue.⁴ Where the war breaks out before the loss, the policy, as we have already seen, is wholly illegal and void.⁵

Commencement of hostilities a criterion of rights.

An alien enemy, in the proper sense of the words, is the natural-born or domiciled subject of a Sovereign State actually at war with our own. Who is an alien enemy.

"The law of England," says Lord Westbury,⁶ "and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the subject of some particular

¹ 13 East, 341.

² *De Tastet v. Taylor*, 4 Taunt. 233.

³ *Flindt v. Waters*, 15 East, 260, 266.

⁴ *Harman v. Kingston*, 3 Camp. 150, 152. As to the replication to such a defence, see *Boulton v. Dobree*, 2 Camp. 162; and see *Alcenius (or Alcinous) v. Nigren*, 4 Ell. & Bl. 217; 23 L. J. (Q. B.) 287; *Shepeler v.*

Durant, 23 L. J. (C. P.) 140.

⁵ *Gamba v. Le Mesurier*, 4 East, 407.

⁶ Per Lord Westbury in *Udny v. Udny*, L. R., 1 H. of Lds. (Scotch cases), 441, 457, 458, 459.

I have taken upon me to collect together on each branch of the subject what as it appears in the judgment is interspersed, and contrasted sentence with sentence.

country, binding him by the tie of natural allegiance, and which may be called his political *status*; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil *status* or condition of the individual and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of *domicil*, which is the criterion established by law for the purpose of determining civil *status*.

Domicil.

Domicil of
origin.

“It is a settled principle that no man shall be without a domicil; and to secure this result the law attributes to every individual as soon as he is born the domicil of his father if the child be legitimate, and the domicil of the mother if illegitimate. This has been called the *domicil of origin*, and is involuntary.

“When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being by the act of the party entirely obliterated and extinguished.

“It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a *domicil of choice*.

“The domicil of origin may be extinguished by act of law, as for example by sentence of death, or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicil of
choice.

“Other domicils, including domicil by operation of law, as

on marriage, are *domicils of choice*. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act.

“Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile and not a definition of the term. How acquired.

“There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or for a particular purpose, but general and indefinite in its future contemplation.

“It is true that residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such a case as soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established.

“Domicil of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. How laid aside.

“Expressions are found in some books and in one or two cases, that the first or existing domicile remains until another is acquired. This is true, if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party until another domicile has *animo et facto* been acquired. Such a conclusion would be absurd; but there is no absurdity, and on the contrary much reason in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined, the domicile of origin revives until a new domicile of choice be acquired.”

In these few sentences of the noble and learned Judge we find a condensed statement of the law respecting domicile and of the rules of evidence according to which the fact of domicile is determined. It would be aside from the proper object of this treatise to attempt here a general discussion of these principles and rules; the more so as the only relation which our subject has with the question of domicile is restricted to a period of war and during that period to the belligerents on either side and those who become domiciled with them. Moreover, it would seem that the time and circumstances so special and peculiar as those of war cannot but modify the sense and limitation put upon those principles and rules in their application to the facts; and hence a further reason arises for declining in this place a general discussion of the law of domicile.

Domicil
during war.

By the commencement of hostilities the *status* of every one resident at the moment in the belligerent territories is *prima facie* determined. The presumption of law as to such a person is that he is domiciled where he then is, and is consequently a belligerent. The evidence of fact is necessary to rebut the presumption.

Neutral in a
belligerent
territory.

First, on the part of one who at the time that war is declared or breaks out is trading in the belligerent territory and wishes not to be compromised by the existence of war, he must be expeditious in getting himself and his property out of the country. Till that be accomplished he is in fact carrying on the trade of the country, and increasing its resources for war, and consequently contravening the policy of its enemy, who has therefore a keen interest, first in presuming everything to the disadvantage of the trader, and then a reason for accelerating the time beyond which the trader's neutrality is lost by the acquisition of a domicile of choice. If such a domicile has already been acquired when hostilities commence, the reason for expeditious removal is the more urgent, in case he would clear himself of the belligerent character.

Neutral
going into

Secondly, if he has gone into the country for a special

temporary purpose, his presence there during hostilities is thereby explained and his neutrality preserved. It is when he out-stays the accomplishment of such a purpose in the belligerent territory that his continuance, and especially his trading there, begins to accumulate as evidence against him of the *animus manendi*. Even before the accomplishment of his temporary purpose, if general trading goes on with him in the belligerent territory, the enemy will scrutinize very carefully with what diligence the purpose that took him into the country is being prosecuted. For if it is being used by him to cloak his designs in order to prosecute a profitable trade apart from the disadvantages of the belligerent character, although in the belligerent country, he is in that case deemed to be a domiciled belligerent and liable to the laws and the misfortunes of the war.¹

Tabbs was a native-born subject of America, commanding a vessel employed in the trade between England and the United States. About four years before the action in which the question of his nationality arose, he had married an English woman, by whom he had a family, and who ever since the marriage had resided in a house which he had taken in Liverpool, where he, too, lived with her when at home. Since his marriage he had made one or two voyages to America, from which he had returned and lived with his family at Liverpool, and for the last year he had never left England; it appeared, however, that he had in contemplation, at some future time, to go with his family to America and reside there. Lord Kenyon held, that his residence in this country, under the circumstances above detailed, had operated a change of domicil, and given him, for all commercial purposes, the national character of a British subject.²

A native-born subject of Great Britain, who had become a

¹ See these questions discussed in *The Harmony*, 2 C. Rob. R. 322; *The Diana*, 5 ibid. 60; *The Ocean*, 5 ibid. 90; *The Indian Chief*, 3 ibid.

12; *The Bernon*, 1 ibid. 102; *Elbers v. United Ins. Co.*, 16 Johns. N. Y. 128.

² *Tabbs v. Bendelack*, 4 Esp. 107.

naturalized citizen of New York, and member of a commercial house there, went, in 1808, to Jamaica (consequently, within the dominions of his native state), to collect debts due to his house; he went there again for the same purpose in 1810, and then stayed there, for that purpose, about a year; he went a third time, for the same purpose, in 1811, and remained there until after the declaration of war by the United States against Great Britain in 1812; during the whole period of his visits to Jamaica his business continued to be conducted at New York, and it was understood there that he proposed to return. Hence, though he had resided a considerable portion of his time at Jamaica during the four years preceding the war, and was there when war was declared, it was held that his native national character had not reverted, so as to supersede that acquired by his residence in the United States, since he was absent rather for a temporary purpose than with the intention of establishing himself abroad.¹

Evidence of
animus
manendi.

The point, then, to be ascertained being the real intention of the party himself, no circumstance can be regarded as unimportant which can in any way tend to throw light upon it, and the amount of evidence required to establish the *animus manendi* must, of course, vary with the circumstances of each case.

Thus, slighter evidence would be requisite *primâ facie* to determine the domicile of a man returning to his own country, than of the same man going to reside in a foreign land. In the former case there is a natural presumption that the party is returning to re-assume his original status; in the other the natural presumption rather is, that he is not going for the purposes of making his home in the foreign country, but rather of returning thence to his own when he shall have accomplished the objects of his journey. Hence a national character, acquired in a foreign country by residence, changes

¹ The *Ann Green*, 1 Gallison's Rep. B. & P. 430; 8 T. R. 31, *S. C.*; The *274*; see also *Marryatt v. Wilson*, 1 *Freundschaft*, 3 Wheaton, 51.

immediately the party has left such country *animus non revertendi*. In such case the native domicile revives while he is yet *in transitu*, for it very easily reverts, and is re-acquired the moment the foreign domicile is abandoned.¹

But here, as in all other cases, the *animus manendi*, or, rather, the *animus non revertendi*, is the all-important test; and therefore a mere return to a man's native country, without any intention to abandon his foreign domicile, does not, as we have seen, work any change of domicile.² Thus, where a British-born subject, who had been naturalized, and had acquired a domicile as a citizen of the United States, returned for a few days to the British dominions, in the course of prosecuting a voyage from America to the East Indies, his native national character was held not to have reverted by this limited stay in his native country for a temporary purpose.³ So a British-born subject, having a mercantile establishment in Lisbon, was held, in the United States, not to have lost the Portuguese national character by returning to England for a special purpose.⁴

Of course, the natives of a belligerent state, if they are resident and carrying on their business in a neutral country, are, by reason of their domicile, for all commercial purposes, regarded as subjects of the neutral state, and enjoy all the privileges, and are subjected to all the inconveniences, of a neutral trade.⁵

Native
belligerent
in neutral
country.

But where the partner of a mercantile house in England sailed with his wife and family for America, after war had

¹ Per Lord Westbury, ante, p. 137; *The Indian Chief*, 3 C. Rob. Adm. Rep. 12; *La Virginie*, 5 C. Rob. Adm. Rep. 98; see 1 Kent, Com. 76; *Story's Conflict of Laws*, c. iii. s. 48, p. 53.

² *Wilson v. Marryatt*, 8 T. R. 31; *The Freundschaft*, 3 Wheaton's Sup. Court R. 51; *The Ann Green*, 1 Gallison's R. 274; see also *The Indian Chief*, 3 C. Rob. Adm. R. 12.

³ *Wilson v. Marryatt*, 8 T. R. 31.

⁴ *The Freundschaft*, supra; see

also the case of *The Ann Green*, supra; *The Nereid*, 9 Cranch's Sup. Court R. 388.

⁵ *Wilson v. Marryatt*, 8 T. R. 31; *McConnell v. Hector*, 3 B. & P. 113; *The Danaus* (in the House of Lords), cited 4 C. Rob. Ad. 255; *Bell v. Reid*, 1 M. & Sel. 726. The cases in the United States on the same subject are referred to in 1 Kent, Com. 75, note. The most important are *The Venus*, 8 Cranch's Sup. Court R. 253; *The Frances*, ibid. 363.

been declared between this country and the States, but before he knew of it, or had any reason to suspect it; and after his arrival in America he continued to reside there throughout the war, but without engaging in trade; as it did not clearly appear that his stay was not compulsory, Lord Ellenborough held that he could not, by such residence, be considered to have acquired a hostile character.¹

It has been held in the United States that if the native-born subject of one state has acquired a domicile in a hostile state, by residing and keeping up a commercial establishment there before the breaking out of hostilities, his property, shipped before knowledge of the war, but while his acquired domicile continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of the hostile country.

Some American merchants, who had gained a domicile by residing and carrying on trade in England, before hearing of the declaration of war by the United States against Great Britain in 1812, and while they had no particular expectation of it, nor any intention of ceasing to reside in this country, shipped cargoes to the United States, which were captured by American cruisers, after a declaration of hostilities: a majority of the Judges of the Supreme Court decided (against the opinion, however, of Marshall, C. J.) that the property was liable to capture as belonging to those who, by trading and residing in an actually hostile country, were to be regarded for all commercial purposes as alien enemies.² Chief Justice Marshall dissented, on the ground that the parties should have had an opportunity given them, after they knew of the declaration of war, to show by their acts whether or not they intended to continue to make the hostile country the place of their permanent abode.³

¹ *Roberts v. Hardy*, 3 M. & Sel. 533, as explained in the case of *Willison v. Patterson*, 7 Taunt. 438.

² *The Venus*, 8 Cranch's Sup. Court R. 277; see 1 Kent, Com. 78, and the remarks of Mr. Phillips, vol. i. no.

159, and note, who inclines to the opinion of Marshall, C. J., and refers to *The Ocean*, 5 C. Rob. Adm. R. 90, as supporting his view of the case.

³ There appears to be some leaning towards this opinion in the judgment

In one case Lord Ellenborough held that a British-born subject became an alien enemy by residing and trading in a hostile country, even though he had been adopted as the citizen of a neutral state, and was then residing and carrying on his business in the hostile country as the recognized agent of such neutral state.¹

Upon these principles British-born subjects, residing and carrying on trade in a neutral country, are admitted, in respect to their *bona fide* trade, to all the privileges of a neutral character.² Thus, a British-born subject, adopted by and trading in the United States, was permitted to prosecute a voyage from America to the East Indies in a manner which would have been illegal in a British subject, but which was permitted by treaty to the citizens of the United States.³

He may also, like any other neutral, carry on trade with powers at war with his own country. Thus, in the case of *The Danaös*, which came before the House of Lords in 1802, a British-born subject, resident and trading in Portugal, was allowed the benefit of the Portuguese neutral character, so far as to render his trade with Holland, then at war with England, not impeachable as an illegal trade.⁴ The same rule was afterwards applied to a natural-born British subject, domiciled in the United States, and it was held that he might lawfully trade to a country at war with England, but at peace with the United States.⁵

If an alien enemy, *flagrante bello*, migrate into a neutral country, certainly gaining thereby considerable advantages, and possibly still retaining a secret connection for the purposes of trade with his own country, he does not thereby

Alien enemy
migrating
flagrante bello.

of the Queen's Bench in *Esposito v. Bowden*, 4 E. & B. 963; 24 L. J. (Q. B.) 210, 215; see Maclachlan on Shipping, 557—559.

¹ *O'Meally v. Wilson*, 1 Camp. 481.

² See *The Emanuel*, 1 C. Rob. Ad. 269.

³ *Wilson v. Marryatt*, 8 T. R. 31.

⁴ Cited in 4 C. Rob. Ad. 255, note.

⁵ *Bell v. Reid*, 1 M. & Sel. 726.

become neutral; at all events, the circumstances attending such a course, with a view to ascertaining his object and intention, will be closely scrutinized.¹

A neutral who is resident and carrying on trade in a foreign country, up to the time of the breaking out of hostilities between that country and our own, is not precluded if he then, with all expedition, breaks up his establishment in the enemy's country, from recovering in our Courts, during the war, on a policy effected before the commencement of hostilities, on his separate share as part owner in a ship and cargo; and yet the other moiety of both may be owned by an alien enemy, in partnership with whom he had, prior to the declaration of hostilities, been carrying on his establishment in the belligerent country.²

National
character of
ports.

Where the party interested is himself a neutral, a policy on goods consigned to him at a neutral port is not void by the fact of his happening at the time to be resident in a place, which though situated in neutral dominions, is occupied by the troops of the enemy.³

During the unexampled circumstances of the First Napoleon's wars, it frequently became important to decide upon the national character of ports, which though nominally neutral, were yet under military occupation by the troops of the French Emperor.

As we shall have occasion to consider these cases elsewhere, it will be sufficient in this place to state the two principles upon which they were mainly decided:—1st, That a port belonging to a neutral state, though coerced, or even occupied, by the forces of a belligerent, does not by virtue of such

¹ The *Dos Hermanos*, 2 Wheaton's Sup. Court R. 76, cited 1 Kent, Com. 75; 1 Phillips, Ins. no. 166.

² *Rotch v. Edie*, 6 T. R. 413; such seems to be the true effect of the

case. See a note of Lord Campbell's to his report of *Bromley v. Heseltine*, 1 Camp. 75.

³ *Bromley v. Heseltine*, 1 Camp. 75.

aggression cease to be neutral and become hostile, provided it still retains its own institutions and its own civil government:—2nd. That the most potent evidence in time of general war, as to the hostile or non-hostile character of ports, is the declaration of our own government, which by either directly or indirectly recognizing any of the ports of a hostile state, or of its colonial possessions, as neutral or non-hostile ports, is binding on our courts of justice.¹

So much for domicil. But irrespective of personal domicil, and notwithstanding the trader's absence from the enemy's country during the war, the produce of his estates in that country, and the commerce conducted by his trading establishment there, will receive the character and suffer the disadvantages of enemy's property and commerce.²

Character of the country of origin in respect of goods and commerce.

At the same time, this principle applies only to property or transactions connected with the hostile firm. If a neutral have two houses of business, one in the neutral and the other in the belligerent country, his property connected with the neutral house is protected from seizure, while his property connected with the hostile establishment is liable to it.³ On the same principle, there may be a partnership between two persons, one residing in a neutral and the other in a belligerent country, and the trade of one of them with the enemy will be held lawful, and that of the other unlawful, and consequently the share of one partner in the joint traffic will be condemned, and that of the other restored.⁴

Distinction.

¹ *Bromley v. Heseltine*, 1 Camp. 75; *Donaldson v. Thomson*, *ibid.* 429; *Johnson v. Greaves*, 2 Taunt. 344; *Atkinson v. Abbott*, 11 East, 135; *Hagedorn v. Bell*, 1 M. & Sel. 450; see also *Blackburn v. Thompson*, 3 Camp. 61.

² *The Portland*, 3 C. Rob. 41; *The Vigilantia*, 1 *ibid.* 1, 15; *The Vrow*

Anna Catharina, 5 *ibid.* 167; *The Phoenix*, 5 *ibid.* 21; *The Dree Gebroeders*, 4 *ibid.* 235.

³ *The Portland*, 3 C. Rob. Ad. R. 41.

⁴ *Ibid.*; *The Herman*, 4 C. Rob. Ad. R. 228; *The Jonge Klassina*, 5 C. Rob. Ad. R. 297.

Privileged
Neutral.

A neutral, however, on the breaking out of hostilities, has the same rights of carrying on trade with either of the belligerents as he had before the war commenced. But if, instead of pursuing such trade on its old footing and in the ordinary course of his previous mercantile transactions in time of peace, he becomes a privileged trader of the enemy; or, if the trade itself consist of a colonial carrying trade between the hostile mother country and any one of her foreign settlements, to which neutral nations were not admitted previous to the war;—the neutral, by the exercise of such privileged or unusual trade, is, in respect of such trade, regarded as an alien enemy, and cannot maintain an action here on a policy to protect it.¹

Trading
Consuls.

The consul of a neutral nation resident as consul in this country, if engaged in such privileged colonial or coasting trade of the enemy, loses his neutral character;² and his consular residence does not protect his goods concerned in such trade from seizure and condemnation as enemy's property.³

The Flag and
the Cargo.

When enemy's goods, although carried in neutral ships, were liable to seizure and confiscation, yet the ship and rest of the cargo were not thereby rendered liable to a similar fate, unless the property of the same owners.⁴

Declaration
of Paris.

By the Treaty of Paris, concluded in 1856, it is declared that the "neutral flag covers enemy's goods with the exception of contraband of war," and that "neutral goods, with the same exception, are not liable to capture under enemy's flag."

¹ See the judgments of Sir W. Scott in *The Immanuel*, 2 C. Rob. Ad. R. 186; *The Anna Catharina*, 4 C. Rob. Ad. R. 107; *The Dree Gebroeders*, *ibid.* 232.

² *The Dree Gebroeders*, 4 C. Rob.

Ad. R. 232.

³ *The Indian Chief*, 3 C. Rob. Ad. R. 12.

⁴ *Barker v. Blakes*, 9 East, 283; *Feise v. Aguilar*, 3 Taunt. 506.

Europeans residing and trading under the protection of factories or colonial establishments in Asia or Africa, have the national character of the European mother state to which the establishment belongs, and under whose protection they live and trade; and the reason of this is obvious: Europeans, so circumstanced, do not become the subjects of the Asiatic or African power in whose dominions such trading establishment is situated.¹ Factories in the East.

Such are some of the more important points in the jurisprudence of this country and the United States, on the subject of national character, as affected by domicile or course of trade. No attempt has been made to illustrate these principles by more recent decisions, which have merely confirmed them; the war of Prussia with Austria and with France has not presented any occasion for applying them to questions connected with the contract of marine insurance, and it has not been deemed desirable further to encumber a work devoted to a special subject, by references to authorities which more properly range themselves under other heads of legal inquiry.

Every person capable of making a contract may be an insurer, and may authorize any person capable of being an agent to underwrite policies in his name and on his behalf. This description of agency in marine insurance is very commonly used by private underwriters and public companies. The practice of insuring with individuals was the earliest in use anywhere, and long continued to be followed in this country. The reference that still appears at the present day in the ordinary Lloyd's policy to "the surest writing or policy of assurance heretofore made in Lombard Street," points to a time when the mercantile operations of exchange Who may be Insurers.

¹ The Indian Chief, 3 C. Rob. Ad. R. 12, 22, 30, 31..

and assurance carried on in London were chiefly in the hands of Italians, who congregated about this locality, ever since known to us by their name. It is from their language that we derive the word which designates the instrument of assurance, *polizza*, which in its English form becomes *policy*, having nothing but the appearance in common with the word that we apply to statecraft. The enterprising vigour of these foreign merchants in England seems to have provoked the jealousy of Englishmen, and our House of Commons petitioned the King against them in the 18th year of Henry VI., 1439, A.D.; but the King refused his consent to the petition being converted into a statute. A severe Act, however, was passed against them in the first year of Richard III. In the course of time, these natives of Lombardy were succeeded by English capitalists, and these appear to have been in the habit of closing their disputes respecting risks and losses and premiums by a species of tribunal of commerce, the members of which were appointed every year by the Lord Mayor of London. That judicature ceasing in the reign of Elizabeth to be of influence with the citizens of that time, was then, and afterwards, in the reign of Charles II., successively renovated and refurbished, but in vain.

The Lombards superseded.

Lloyd's underwriters.

In the time of William III. and of Queen Anne, when coffee-houses in London were the fashionable places of resort, and some of the most noted of these became the haunts—each for a peculiar class (as Will's for literary men), Lloyd's at the corner of Abchurch Lane, in Lombard Street, became the celebrated resort of seafaring men, and those that did business with them. There, and subsequently in Pope's Head Alley, and ultimately on the west side of the old Royal Exchange, at this coffee-house congregated the underwriters of London, having formed an association among themselves, still familiarly known on the high places of commerce as Lloyd's; and in connection with this association they have developed a ramified system of agency

radiating everywhere to the ports of the world, which is now become of imposing magnitude, essential to the business of marine insurance whether in the hands of individuals or of companies, and indispensable to the general interests of British commerce.

Lloyd's underwriters now meet and carry on their business in subscription rooms over the Royal Exchange, consisting of two apartments, one, in which the underwriters sit for the transaction of business with their employers, called the Public Room, and another, called the Private Room, opening out of the first.¹

The affairs of the subscribers to these rooms are managed by a committee, chosen from their own number, called Lloyd's committee, and presided over by a chairman.

Agents (generally called Lloyd's agents) are appointed by this committee in all the principal ports of the world, whose business it is regularly to forward to Lloyd's accounts of all departures from and arrivals at their ports, as well as of losses and other casualties; and, in general, all such information as may be supposed of importance in guiding the judgment of the underwriters. These written accounts, which, in the present state of our commerce, are arriving hourly from some part or other of the world, are posted up as fast as they come in, on the walls of the inner or private room at Lloyd's, and are called Lloyd's Written Lists; as soon as the pressure of business will allow, the contents of these written lists are copied out into two large books, placed in a conspicuous part of the inner room, and also in another book, which is placed in the large outer room for the more convenient use of the general public; after being thus copied into these books, which are called Lloyd's Books, the written lists are subsequently printed and filed, and copies are distributed to subscribers.

Thus, there are three sources of information relating to the arrivals, departures, losses, accidents, and incidents of shipping

¹ This society was regulated by a deed of association, dated 1811, until it was incorporated in 1871 by special Act, 34 Vict. c. xxi.

accessible to the subscribers at Lloyd's:—The written lists, containing the latest intelligence; Lloyd's books, containing this intelligence condensed, methodized, and alphabetically arranged; the printed lists, filed for those who may wish to consult them.¹

Form of underwriting.

Lloyd's underwriters individually sign their names at the foot of the policy, and opposite thereto the sum insured by each in figures and also in words, with the date of so doing.² This is technically called underwriting the policy for so much, and each thereby makes a separate contract in the terms of the instrument with the assured of the particular amount set opposite to his name. The right of action in the assured is consequently against each separately, and not against all jointly.

It appears that of late, say about the year 1853 in particular instances, and since 1869 generally from all the underwriting members, the Committee of Lloyd's have required a written guarantee to cover the engagements of each in his capacity as an underwriting member, usually of the amount of 5000*l.*, with a view to maintaining the credit of the room. The Corporation of Lloyd's being thus constituted trustees of the guarantee on behalf of those who have sustained damage

¹ "The receipt of official news of capture," &c. being a term in a policy, the question was, what would satisfy it. News of the embargo reached a mercantile firm, the agents of the ship, in London, by telegraph; the telegram was carried by the insurance broker to Lloyd's, where, upon its being authenticated with the name of the receiving firm, the contents were entered in Lloyd's "Lost Book." This was held by a special jury at Guildhall, Erle, C. J., presiding, to be official news; *Fowler v. The English and Scottish Marine Ins. Co.*, Guildhall Sitt. post. M. T. 1864.

² 30 & 31 Vict. c. 23, s. 7. Rule 4 in the sched. to the special Act,

34 Vict. c. xxi, incorporating the Society of Lloyd's is as follows:—

"An underwriting member shall not, by himself or by any partner or other substitute, directly or indirectly underwrite in the city of London a policy of insurance, as follows: (1) In the name of a partnership, or otherwise than in the name of one individual (being an underwriting member of the Society) for each separate sum subscribed; or (2) For the account, benefit, or advantage of any company or association, unless they are subscribers to the Society, nor unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business."

by the failure of the underwriting member in respect of his engagements in that capacity, are entitled to put it in suit, although they have themselves suffered no loss.¹

About the beginning of the Great Bubble Year, that is, 1719-1720, certain persons desirous of forming a Company for the purposes of insurance, headed respectively by Lord Onslow (who afterwards formed the Royal Exchange Assurance Company), and by Lord Chetwynd (who afterwards formed the London Assurance Company), made sundry unavailing attempts to interest the House of Commons in their favour for that end. At length, hearing that the debts of the Civil List were heavy, and the Government in difficulty for the means of meeting them, these two sets of gentlemen offered a contribution of 300,000*l.* each, provided the Crown would incorporate them with a monopoly as insurance companies. The 6 Geo. 1, c. 18, founded on a message sent down to the House of Commons the 4th of May, 1720, passed the same year, and the King, in consequence, incorporated the two Companies with the exclusive right of making sea insurances in their corporate capacity, and restraining all others from granting insurances as companies or partnerships on a joint capital. By an Act of the next year, 7 Geo. 1, c. 27, 150,000*l.* was remitted to each Company of the price originally offered for its incorporation. An Act of the following year, 8 Geo. 1, c. 15, relieved them of any liability to double damages or costs at law; and the 11 Geo. 1, c. 30, gave them the right of pleading the general issue to any action on their policies, which they still retain.² These latter two statutes, as the law stood then, conferred privileges of a value almost inappreciably great. Her Majesty's subjects are now, by the amelioration of the law, generally

The two Old Companies.

¹ Lloyd's v. Harper, 16 Ch. D. 290.

² They retain this right still, notwithstanding the 5 & 6 Vict. c. 97, s. 3; Carr v. The Royal Exch. Ass.

Co., 31 L. J. (Q. B.) 93; 1 B. & S. 956; and amid the recent changes effected by the Judicature Acts, this privilege appears to remain unchanged.

placed on a level with them in respect of the subject of the former of the two ; and the privilege under the latter, though it be still preserved to them, is reduced by changes in the system of pleading to what is little better than an empty form.

Their main privilege of exclusively granting marine policies as corporate bodies was retained by them till the year 1824, when the 5 Geo. 4, c. 114, repealed so much of the 6 Geo. 1, c. 18, as restrains "any corporation or body politic, society or partnership, or persons acting in any society or partnership," from underwriting sea policies or lending money on bottomry. During this long interval of a century the assured could not obtain in Great Britain the joint security of any number of individuals to a marine policy except from these two companies ; and they, it seems, clogged their acceptance of risks with so many conditions that the chief current of business flowed in the direction of Lloyd's. It is hardly a subject for wonder, therefore, that Lloyd's underwriters should have assisted these two Companies in making a vigorous resistance to any repeal of their monopoly.

Shipowners'
associations
or clubs.

Necessity, meanwhile, gave rise to the shipowners' clubs for the mutual assurance of their respective vessels. One of the conditions of membership usually exacted in these societies is the possession of a certain amount of ship property insured in the club. An essential peculiarity of their practical working is the absence of premiums. Each member is both assured and insurer ; assured, as to his own property in the club by all the other members in the ratio of their respective properties in it ; and *e converso* insurer, in the ratio of his own property in the club for that of each of the others. Their mutual covenants or agreements are the *quid pro quo*, the consideration of the contract. The expense of their insurance is determined by the amount of their contributions to losses for the year in addition to the expenses of the club.

Contrary to an opinion formerly existing, and even expressed on the bench,¹ that a policy was unnecessary to the validity of such insurances, it is now the law that no such insurance is valid unless expressed in a stamped policy, and unless such policy shall specify each of the following particulars, viz., the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured.² As neither the sum insured, nor the names of the underwriters are capable of being ascertained, this provision of the statute has proved fatal to these clubs as originally constituted, probably without any intention of so affecting them on the part of the legislature.

Stamped
policy indis-
pensable.

During the monopoly already described, it was essential to the legality of such clubs that their members should be liable individually only, each for his own proportion, and not jointly, or the one for the other or others of them,³ and therefore a club that transgressed this rule only so far as to make the members collectively liable for the share of an insolvent member, was held to be illegal.⁴ The character thus originally impressed upon these clubs by the interests of a monopoly, is without exception still retained by them as an advantage, namely, the individual liability of each member for his own proportion⁵ only. Since the Companies Act of 1862, however, and after a variety of opinions among the Judges⁶ had been expressed as to the legality of these clubs, an adverse opinion was decisively given by Sir George Jessel,

Legal
liabilities.

¹ *Bromley v. Williams*, 32 L. J. (Ch.) 716. And see *Harvey v. Beckwith*, 12 W. R. (*coram* Wood, V.-C.) 819, (on appeal) 996; *Mead v. Davidson*, 3 A. & E. 303; *Turpin v. Bilton*, 3 Man. & Gr. 455.

² *In re London Marine Ins. Ass.* (*Smith's Case*), L. R., 4 Ch. App. 611; *Re The Arthur Average Ass.*, *Ex parte Hargrove & Co.*, L. R., 10 Ch. App. 542; 30 & 31 Vict. c. 23, ss. 7 and 9.

³ *Harrison v. Millar*, 7 T. R. 340, note; *Lees v. Smith*, *ibid.* 338; and

see *Strong v. Harvey*, 5 Bing. 304.

⁴ *Lees v. Smith*, 7 T. R. 338.

⁵ It was argued that a policy which did not express this proportion was invalid; but *Gibbs, C. J.*, held it to be good without that; indeed, pointing out that the amount of it could not be known at the time of effecting the policy; *Borrell v. Moore*, 4 Camp. 166.

⁶ Per Lord Westbury, C., *Turnbull v. Woolfe*, 9 Jur., N. S. 57; *In re London Marine Ins. Ass.* (*Andrew's Case, &c.*), L. R., 8 Eq. 176.

and that opinion conclusively affirmed by the Court of Appeal in 1882;¹ and now these clubs, to maintain their existence in accordance with law, have been formed into companies registered under the Companies Act, but still based upon the principles and continued for the purposes of mutual assurance.

In favour of these clubs or companies, an exception is made in respect of stamping these policies subsequently to their being underwritten. The statute provides that it shall not be lawful to stamp any policy at any time after it is signed or underwritten by any person, on any pretence whatever, except in two cases: the first is, any policy of mutual insurance having a stamp or stamps impressed thereon may, if required, be stamped with an additional stamp or stamps, provided that, at the time such additional stamp or stamps shall be required, the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant.²

Companies formed for the purposes of mutual insurance are usually limited by guarantee, say of 5%, to meet the costs, charges, and expenses of the company on being wound up; but that sum of 5% is not the fund from which losses under the policy are to be met; for in respect of such losses the company may sue, and be sued by, the individual member.³

Consequences
of the repeal
of the mono-
poly.

The repeal of the monopoly formerly possessed by the two old companies has been succeeded by the rapid multiplication of public companies, some of them incorporated by special

¹ The Master of the Rolls (Sir G. Jessel) gave a definition of the term *gain* used in the 4th and 21st sections of the Companies Act, 1862 (25 & 26 Vict. c. 89), which, beyond all doubt, had the effect of including these clubs among the companies declared illegal by that statute unless registered under its provisions; *Re Arthur Average Ass.*, L. R., 10 Ch. App. 542;

adopted by the Court of Appeal in *Re Padstow Total Loss Ass.*, 20 Ch. D. 137.

² 30 & 31 Vict. c. 26, s. 9; post, Chap. V.

³ *Lion Ins. Ass. v. Tucker*, 12 Q. B. D. 176; 53 L. J. (Q. B.) 185; *Marine Mutual Ins. Ass. v. Young*, 43 L. T., N. S. 441.

statutes, some by charter from the Crown, and others formed upon the provisions of a partnership deed, for the purpose of granting marine policies.

All these various societies may now be registered under the "Companies Act, 1862,"¹ and thereby obtain the advantages suitable to each as provided under that statute. By doing so, they retain all property, and all rights, interests, and obligations in connection with property; their rights and liabilities in respect of debts, obligations, and contracts; and the peculiar modifications impressed on their constitution—and their rights and liabilities in connection therewith—by the statute, charter, or deed, under which they may have been formed.² Moreover, any stipulation or condition in any policy affecting the liability of members, or of the funds of any company, remains in full force and effect, notwithstanding registration of the company under that Act.³

Companies
under the
Companies
Act.

Any company registered under the 7 & 8 Vict. c. 110, if not registered under the Companies Act, 1862, is not illegal, but subjected to the following consequences:—1. It is incapable of suing, yet not incapable of being sued, either at law or in equity; 2. No dividend is payable to any of its shareholders; and 3. Each director or manager incurs a penalty of 5*l.* a day during default in registering under the later Act.⁴ Policies issued under these circumstances appear to be valid notwithstanding, and they may be enforced against the company.

No partnership or company consisting of more than twenty persons, which has been formed on or after the 2nd of November, 1862, for the purpose of granting policies of insurance, redeemable out of their joint funds, if unregistered under the Act of 1862, is legal,⁵ and consequently the policies issued by such a body are invalid.

"For the purposes of this (The Companies) Act (1862), a

¹ 25 & 26 Vict. c. 89, ss. 6, 180, 206.

² Ibid. ss. 193, 194, 196.

³ Ibid. s. 38, No. 6.

⁴ Ibid. s. 210.

⁵ Ibid. s. 4.

company that carries on the business of insurance in common with any other business or businesses, shall be deemed to be an insurance company.”¹

Consequences
of issuing
marine poli-
cies *ultra vires*
of the com-
pany.

If the issue of marine policies be *ultra vires* of the company, the policies are invalid, and the premiums paid may be recovered back. A company constituted for stated purposes, for instance, of life assurance, cannot extend its business to marine insurance, except, as it would seem, under new powers conferred with similar solemnities and sanctions as were the old. In the deed of the Phoenix Life Assurance Company its business was stated to be life assurance; but by resolutions passed at an extraordinary general meeting, called for the purpose, it was determined to grant marine policies; and whilst this new branch of business was being carried on, a report to that effect was sent to the registry office, and was distributed with the dividend warrant, and the matter was mentioned at the annual meetings. This was held, however, not to be sufficient evidence of the consent of the shareholders; indeed, the learned Vice-Chancellor (Wood) was of opinion that a supplemental deed would have been necessary to confer the new powers. The policies were, therefore, held invalid, and the holders of them entitled to repayment of the premiums.²

Form of
underwriting
by companies.

Since the 5 Geo. 4, c. 114, legalized insurance companies and partnerships, the mode of making them parties to a policy varies severally with the constitution of each. For this purpose, the several names of all the members of the

¹ 25 & 26 Vict. c. 89, s. 3; and see *The London Monetary Advance and Life Ass. Co. v. Smith*, 3 H. & N. 543, under the previous statutes.

² *The Phoenix Life Ass. Co.*, in the case of *Burges v. Stocks*, 2 J. & H. 441. Accord. *Hambro' v. Hull and London Fire Ass. Co.*, 3 H. & N. 789.

That the objects of a company incorporated under the Companies Act,

1862, as stated in the memorandum of association, cannot be departed from, and consequently that a contract made by the directors in respect of a matter not included in such memorandum, is *ultra vires* of the directors and not binding on the company, is now matter of clear law; see *Ashbury Railway Carriage, &c., Co. v. Riche*, L. R., 7 H. of Lds. 653.

partnership or company never were necessarily subscribed, notwithstanding the 36 Geo. 3, c. 63, s. 11.¹ In some cases, the matter is left as at common law, so that a valid policy is made by the subscription of the partnership firm, or the adhibition of the seal of the body corporate. But the form of execution may be indefinitely varied by the statute, charter, deed, or articles of association under which the company is constituted.²

¹ Now repealed by the 30 & 31 Vict. c. 23. If partners do underwrite their several names for separate sums, the right of the assured against the partnership assets is not thereby invalidated; *Brett v. Beckwith*, 26 L. J. (Ch.) 130, *coram* M. R.

² See the general principle laid down and applied in *Reid v. Allan*, 4 Exch. 326; *Dowdall v. Allan*, 19 L. J. (Q. B.) 41. In an unreported case where a rule for a new trial or to enter a verdict for the defendants was obtained on several grounds, and among these on this that the declaration purported to be on a simple contract, whereas the policy

was made by a company under seal; when cause came to be shown on that point, Blackburn, J., inquired whether the seal in that case was of any other legal effect than merely the form proper to the company? Counsel for plaintiff thereupon desisted from arguing the point, and it was not further pressed by the defendants; *Roper v. English and Scotch Marine Ins. Co.*, *coram* Q. B.

This, accordingly, seems now to be the opinion entertained in the profession, at all events in respect of trading and similar companies registered under the Companies Act.

CHAPTER IV.

THE AGENTS FOR MARINE INSURANCE.

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Considered
in relation to
the law of
agency.

IN the present chapter it is proposed to consider the relations of insurance agents to their employers,—first, as governed by the general principles of the law of agency,—and, secondly, as affected by the general course of business in sea insurance, in so far as that has grown to be a usage and a custom.

Agents of the
Assured.

Insurance agents may be employed either for the assured to effect, or for the underwriters to subscribe, policies; we treat of them in their order. Confining, therefore, our attention to insurance agents acting on behalf of the assured, we shall consider, in the first place, the nature of the authority under which they act.

Their
authority.

Insurance agents may procure policies to be effected either, first, in consequence of orders expressly given them by their employers; or, secondly, by virtue of an implied authority arising out of the relation in which they stand to the persons for whom, or the property on which, they procure the insurance to be effected; or, thirdly, insurance made by them without the prior authority may be ratified by the subsequent adoption of the assured. In

effect, the third coincides with the first in point of principle, but in facts it differs, and may therefore be considered apart.

First, with regard to persons procuring sea insurances to be effected at the express request, instance, or direction of the assured. In these cases no difficulty can arise as to the authority to insure; every person who is specially requested or directed so to do by the party interested may effect a policy to protect the interests of his employer; if, indeed, he himself puts the policy in suit or founds any legal claim upon it, he must, of course, be prepared, in the first instance, to prove the express authority, as given, whether verbally or in writing. Their express authority.

The questions that have arisen in these cases of express authority turn mainly on this,—whether and under what circumstances the express order to insure imposes on the agent the positive duty of causing the insurance to be effected; as both points will more properly fall to be considered when we are discussing the duties and liabilities of insurance agents, we pass on to the next part of our subject.

As to the implied authority to insure arising out of the relation of the agent to the parties for whom, or the property on which the insurance is effected, the following are some of the principal points that have been decided. Their implied authority.

A partner may, without express authority from the other members of the firm, procure an insurance to be effected for him and them on partnership property; and if, by his directions, such an insurance is effected “on account of the firm,” all the members of the firm are liable to the broker by whom the policy was effected, for premiums and commissions.¹ A partner.

¹ Hooper v. Lusby, 4 Camp. 66. That which is unusual in this case is that one of the partners was held to have made the firm liable for insurances, directed on account of

the firm, on two ships of which the several partners held separate shares as part-owners and not as partners.

Not a part-owner.

But the same rule does not apply to part-owners, none of whom can bind the other part-owners by any policy originally effected without their express authority, and not subsequently adopted by their ratification. The reason of this, in the words of Lord Ellenborough, is that, "each separate share in the ship is the distinct property of each individual part-owner, whose business it is to protect it by insurance; so that the insurance of another cannot be binding on such proprietors without some evidence importing an authority by them."¹

Although such part-owner be ship's husband.

This is so even where the part-owner, who has given orders for the insurance, is ship's husband or managing owner, appointed in the usual way to act discretionally for all the other owners. Nothing will make his insurance binding on the others, except either a particular direction from them to insure, or satisfactory proof that the other part-owners severally approved and ratified the insurance after it came to their knowledge as a step taken for their benefit.² Consequently, without such express direction, or subsequent ratification, the brokers who effect the policy under his directions must look to him only for premiums, and are liable to him alone for the amount received by them from the underwriters on account of losses.³

Special adventure in partnership.

Whether a special partnership in a particular adventure merely, imply, *ex rei natura*, at common law such an agency in each partner or even in the common manager as without express authority enables him to bind all for the premiums of insurance, admits of doubt, notwithstanding the affirmative is favoured by the language of some of the Judges in *Robinson v. Gleadow*.⁴ Considering how immediately the end is in contemplation of the adventurers from the instant of beginning, so as to be specified and detailed in the very

¹ Per Lord Ellenborough, in *Bell v. Humphries*, 2 Stark. 345. See N. C. 156.

French v. Backhouse, 5 Burr. 2727.

² *French v. Backhouse*, 5 Burr. 2727; *Robinson v. Gleadow*, 2 Bing.

³ *Roberts v. Ogilby*, 9 Price, 269.

⁴ *Robinson v. Gleadow*, 2 Bing. N. C. 156.

act of contributing the means, one is almost driven to construe the silence of the partners in respect of insurance under the maxim "*Expressum facit cessare tacitum*," unless the adventure be so completely one and indivisible that the partners could not conveniently insure each his own share.¹

A consignor or commission agent, to whom funds are remitted to purchase and ship goods for his employer—has he any implied authority, as such, in the absence of express orders, to insure such goods on behalf of his principal? Such insurances are not unfrequently made in expectation of their being subsequently adopted by the principal. In the absence of a course of dealing, of prior authority, or subsequent adoption, would such insurances be upheld, so as to give the agent who had effected them a right to charge the premium to his principal, or to demand a loss from the underwriter?

Consignor or
commission
agent.

As a general rule, and in accordance with ordinary mercantile practice, the answer to this question, it seems, must be in the negative. Where orders are given to consign, and no orders given to insure, the practical inference generally would be, either that the principal meant to effect the insurance himself, or intended to remain uninsured. Exceptions to the general rule may, of course, be created by circumstances. An established course of dealing between the principal and agent; or the usage of a particular port or trade,² may be reasonably held to confer an implied authority on the consignor to effect an insurance on behalf of his principal.³

¹ See *Lindsay v. Gibbs*, 4 Jur., N. S. 779; on appeal, 28 L. J. (Ch.) 692; *Green v. Briggs*, 6 Hare, 295; *Alexander v. Simms*, 23 L. J. (Ch.) 721.

² Mr. Duer adds: "An authority to insure may probably arise by implication in all cases where, from special or unforeseen circumstances, the agent is justified in believing that the property, unless insured by

himself, will be unprotected, and that his principal, if on the spot, would himself direct the insurance."—Mr. Arnould adopted this on the high authority of Mr. Duer; but it may be doubted whether authority could be implied from such a state of things, however reasonable it would be in the agent to insure, relying on the ratification of his principal.

³ 2 Duer, 101-104.

Consignee.

The same question may be put with regard to the implied authority of the consignee, as such, to insure. The answer to this question depends on the sense in which the word consignee is used. A consignee making advances clearly has not only the right to effect an insurance on his own behalf, and to recover thereon to the extent of those advances, but also an implied authority to insure on behalf of his consignor.¹ But a mere naked consignee—one, that is, who has no personal interest in the property consigned to him, but is the mere transmittee of the bill of lading with directions to sell or otherwise dispose of the goods to which it relates—has no implied authority (in the absence of an established course of dealing) to effect insurances on behalf of his consignor.²

**General agent
of foreign
merchant.**

Has the general agent of a foreign merchant an implied authority to insure on his behalf? Here, again, the answer to the question must depend on the extent of trust and authority embraced by the term *general agency*. Where the general agency consists in this, that a merchant in one country consigns all his goods intended for sale in another country to a particular merchant there, and effects through him all his purchases, this alone, without some evidence of a special course of dealing in regard to insurances, would not show that either correspondent had implied authority to insure on behalf of the other. But where the trust reposed is more extensive; for instance, where a foreign merchant employs a general agent to procure consignments, and make advances and shipments on his account, leaving the whole conduct and management of the business entirely in the agent's uncontrolled and unassisted discretion; an authority to insure on the foreign merchant's behalf would be implied as a necessary incident to conducting the business of such an agency.³

¹ Wolff v. Horncastle, 1 B. & P. 316; Carruthers v. Sheddon, 6 Taunt. 14; Smith v. Lascelles, 2 T. Rep. 187; Craufurd v. Hunter, 8 T. Rep. 23.

² 2 Duer, 104-111. See 2 Phillips, no. 1858.

³ 2 Duer, 111-113. Judge Duer says, "Such agents as those last men-

An implied authority to insure may arise from the peculiar situation of the property with which the agent effecting the insurance is entrusted. Thus, although the master, as such, has not in general an implied authority to effect insurance either on ship, freight, or cargo,¹ yet there seems little doubt that cases may arise which would confer that authority on him. Where the ship is lost, but the cargo or part of it is saved, under such circumstances as to make it impossible either to sell it at the place of disaster, or to forward it to the port of destination, the master, if he had the chance of so doing, would be justified, as agent for all parties concerned, in sending it on to some other port for sale. In such a case, if there were no means of speedy communication with the owners, the law that confers the agency would seem also to imply in the agent authority to insure.²

The peculiar situation of the property.

It has been intimated by a learned Judge in the United States, that in a similar case, a like authority would be implied in the supercargo.³ A merchant, who has ordered goods from a foreign correspondent, may refuse to receive them if in excess of, or not according to, order; in such case if he elect to re-ship them, he has, in the opinion of Lord Hardwicke, an implied authority to insure them on behalf of the consignor.⁴

Generally speaking, as we have seen, a mere order to consign or forward goods will not carry with it an implied authority to insure on behalf of the party giving the order. In a case, however, where an agent was empowered by the owners of a ship and cargo, captured as prize, to prosecute their claims in the foreign Prize Court, to make

tioned are to be found in all our principal cities; and their universal practice is either to insure themselves the shipments made to their principals, or to take an assignment of the policies, that for the security of their principal they require to be effected;" p. 113.

¹ *Craufurd v. Hunter*, 8 T. Rep. 23.

² 2 Duer, 101.

³ Per Jones, J., in *De Forest v. Fulton F. & M. Ins. Co.*, 1 Hall, 84.

⁴ *Cornwall v. Wilson*, 1 Ves. sen. 511.

such compromise as he might deem advisable, and in case of restitution, "to forward the ship to London," upon objection that these circumstances raised no implied authority in the agent to direct an insurance on the property after restitution, Lord Ellenborough held that the order to forward the ship to London was an authority to insure her.¹

Ratification
equivalent
to prior
authority.

The cases hitherto considered have been those in which a prior authority to insure has either been expressly given, or has been implied from the relation of the parties effecting the policy, either to those for whose benefit the insurance is intended or to the property to be protected. It is not, however, essential to prove prior authority, either express or implied; it will be sufficient to show that the principal, on becoming acquainted with what the party effecting the insurance has done, ratifies and adopts it, such subsequent ratification being equivalent to a prior authority.²

This general principle has been so abundantly illustrated in our jurisprudence, and the cases establishing it will be so fully noticed elsewhere, that it will be sufficient to give below a general reference to some of the leading authorities.³

Thus, although one part-owner has no original implied authority from the rest to insure on their account, yet if he does so, and they subsequently adopt the insurance, they are bound by it.⁴ So, although the captors of a prize have no original implied authority to insure, yet, if they do insure for whom it may concern, and the Crown, in whom the legal interest vests, subsequently adopts the insurance, it is thereby rendered valid.⁵ Whether the clerk of a foreign

¹ *Robertson v. Hamilton*, 14 East, 522. See the case as stated and commented on, 2 Duer, 101, 102.

² Per Best, C. J., *Maclean v. Dunn*, 4 Bing. 722, 727.

³ *Wolff v. Horncastle*, 1 B. & P. 316; *Lucena v. Craufurd*, 2 B. & P. N. R. 269; *Stirling v. Vaughan*, 11 East, 619; *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2

M. & Sel. 485; *Robinson v. Gleadow*, 2 Bing. N. C. 156.

⁴ *French v. Backhouse*, 5 Burr. 2227; *Robinson v. Gleadow*, 2 Bing. N. C. 156; *Lindsay v. Gibbs*, 4 Jur. N. S. 779; on appeal, 28 L. J. (Ch.) 692.

⁵ *Routh v. Thompson*, 13 East, 274; *Lucena v. Craufurd*, 2 B. & P. N. R. 269.

consignee, as such, has a prior implied authority to direct an insurance to be effected by English correspondents of his master on a consignment made by them on account, and to the order of his employer, may be doubtful; but the foreign principal by subsequently adopting it ratifies it with his authority.¹

As regards the evidence necessary in such cases, proof of an express ratification is not indispensable; the adoption of the policy may be an inference from the conduct of him for whose benefit it was originally intended. If he means to repudiate the benefit, it is his duty to express his dissent within a reasonable time of his being informed of the policy; and if he fail to do so, his adoption of the contract will, generally speaking, be inferred from his silence. At all events, this will be so where those effecting the policy, instead of being mere strangers or volunteers, stand in such relations of business or correspondence as would give them and others aware of it a reasonable ground for anticipating his adoption of the insurance.²

Evidence of
ratification.

Thus, in the case of part-owners, where the evidence was, that the one of them insuring had told all his co-part-owners that he had insured for all, and that they did not object to it;³ or where it appeared that the part-owner insuring had entered the premium in his books, which were open to the inspection of the other owners, and that these had actually inspected an extract from these books relating to the insurance transaction;—in these cases, there being no objection made, this was held enough to warrant a verdict that the part-owner insuring had done so with the authority of his co-owners.⁴

¹ *Barlow v. Leckie*, 4 J. B. Moore, 8.

² This distinction is suggested, as it seems to me, upon solid grounds by Judge Duer, vol. ii. pp. 151–154; see also note v. to sect. x. pp. 178–182, in which he discusses the question “whether the mere omission of the principal to reply to a letter of advice from a self-constituted agent is to be regarded as evidence of an adoption

of the agent’s act:” the learned jurist takes, and I think quite correctly, the negative view.

³ *French v. Backhouse*, 5 Burr. 2727. The action here was by the ship’s husband against his co-part-owners to recover premiums on a policy effected by him on their behalf.

⁴ *Robinson v. Gleadow*, 3 Bing.

Conditional ratification.

An express ratification, conditional in its terms, becomes absolute and equivalent to prior authority on the happening of the contingency on which it was to depend. The general agent at New York of a merchant resident at Carthagen, having effected an insurance for him, without instructions, gave him notice of what he had done. The Carthagen merchant wrote in answer, that, if other insurances which he had ordered should not have been made, and if the ship should not have arrived safe, he wished the policy to stand, otherwise to be cancelled. When this answer was received in New York, the other insurance referred to had not been made, and the ship (which was then out of time) had not arrived; in fact, was totally lost. An action having been brought in the Superior Court of New York on the policy, Oakley, J., before whom the case was tried, held the ratification sufficient, and judgment was recovered for the loss.¹

When the adoption must be made.

As a general rule of law, ratification is valid if made within the time within which the principal could himself have made the contract; but in marine insurance the rule so limited would operate mischievously, and consequently it has long been received law that a ratification to be valid need not be during the pendency of the risk. In many of the cases on the subject there was no ratification till after the loss had taken place, and was known to the principal;² and, in one case, the only evidence of adoption was a letter written by the principal two years after the making of the insurance, and nearly as long after he had become aware of the loss, expressing a hope that the party who had effected the policy had procured a final settlement from the underwriters.³

N. C. 156. The action was by the assignees of the broker against all the part-owners for premiums.

¹ *Bridge v. Niagara Ins. Co.*, 1 Hall, 247, cited 2 Phillips, no. 1868. In point of fact, a conditional order ceases to be so, and becomes positive, when, before receipt by the party who

is to execute it, its conditions have been fulfilled.

² *Lucena v. Craufurd*, 2 B. & P. N. R. 269; *Routh v. Thompson*, 13 East, 274; *Barlow v. Leckie*, 4 J. B. Moore, 8.

³ *Hagedorn v. Oliverson*, 2 M. & Sel. 485.

Accordingly the Court of Appeal, when asked to review these cases in order to restrain the time for valid ratification within narrower limits, recognized the exception as one that had long been established and no doubt found convenient in the case of marine insurance, and therefore refused to disturb it.¹

That, however, which is relied upon as a ratification must be done, said, or written by the principal after he is cognizant of the insurance. A general order to insure, given by the principal before knowledge of the particular insurance, though not received by the party insuring till after the policy was effected, cannot, it seems, be construed into an adoption of such policy.²

Ratification must be with knowledge of what has been done.

With regard to the revocation of an express authority to insure given to an agent, the time within which it may be made depends of course upon this, whether the agent, acting in pursuance of the authority, has conclusively bound himself or third parties before receiving the revocation. If he have not, the revocation will be operative; if he have, it will be ineffectual. In this country no contract for sea insurance is valid, unless the same is expressed in a duly stamped policy, containing the particulars required by the statute.³ Hence, the authority given to an insurance agent may be revoked, notwithstanding the initialing of the slip by the underwriters, at any time before the regular stamped policy is subscribed: and if a broker, having procured a slip to be written on terms within the scope of his original authority, afterwards receive an intimation from his principals that they will not consent to such terms, and, notwithstanding such notice, effect a stamped policy on those terms, and pay the premiums, he cannot recover against his employers for the premiums so paid, nor for his commission.⁴

Where an express authority to insure may be revoked.

¹ *Williams v. North China Ins. Co.*, 1 C. P. Div. 757.

² *Bell v. Janson*, 1 M. & Sel. 201.

³ 30 Vict. c. 23, ss. 7 and 9.

⁴ *Warwick v. Slade*, 3 Camp. 127. See post, Chap. V. as to the effect of the slip.

Duties and
Liabilities
of the agents
of the as-
sured.

By a general principle of the law of agency, every person entrusted and undertaking to do business for another, even though he is to be paid nothing for his trouble, is bound so to conduct himself in the business as not to be guilty of gross negligence.

Skilled agents
acting gratui-
tously.

If such unpaid agent be an unprofessional person, or the business he undertakes be unconnected with his general trade or calling—this is all he is bound to; but if his situation or profession is such as to imply skill, and the business he undertakes is directly connected with the exercise of his profession, then, although his undertaking be gratuitous, the failure to exert such skill will be imputable to him as gross negligence.

Skilled and
paid agents.

If the person employed is to be paid for his trouble, and is also engaged in some trade or profession, with the exercise of which the business he undertakes is intimately connected, such person is bound to exercise, in the conduct of the business, a reasonable degree of skill, that is, as much skill as is, and no more than ordinarily is, possessed and exercised by persons of average capacity engaged in the same business or employment.¹

Action on
the case for
negligence.

If, therefore, an agent, being unpaid and unskilled, is guilty of gross negligence, or, being paid and skilled, or only the latter, exerts not as much skill in the business as might fairly be expected from his situation or profession, there is a right of action against him for the damage sustained, or the advantages lost, through such failure of duty.

Application
of these
principles.

The majority of persons employed in the business of sea insurance are both paid and skilled agents, or, at all events, either the one or the other. Generally speaking, therefore,

¹ See *Coggs v. Bernard*, and the notes 1 Smith's L. C. 188, 207, 210. See also *Story on Agency*, 149, 150.

the question of their liability for negligence turns on the inquiry whether they exerted such an amount of reasonable skill in effecting the policy as is ordinarily possessed and exercised by persons of common capacity engaged in the same business. From a policy broker, whose main occupation is to manage sea insurance transactions, a higher degree of skill may fairly be claimed than from a merchant or commission agent, who may be expected, indeed, to possess a general acquaintance with maritime and mercantile affairs, but no special knowledge of the business of sea insurance.

Notwithstanding doubts which at one time prevailed, this may now be taken to be the law as to the liability of a person who voluntarily and without consideration undertakes to effect insurances for another, according as he is unskilled, or skilled, if he takes any steps towards performance of his undertaking.¹ But if the person, who voluntarily promises without any kind of consideration to procure an insurance, takes no steps whatever towards the performance of his promise, he is not liable to an action for *nonfeasance*.²

Generally speaking, a person to whom an order to insure has been transmitted, is under no obligation to accept the trust; but there are certain cases in which an express order to insure, not only may, but must be complied with.

When request to insure must be complied with.

1. Where the merchant abroad has effects in the hands of his agent or correspondent here, he has a right to expect that

Effects in the agent's hands.

¹ *Wallace v. Telfair*, before Buller, J., at N. P., cited in *Wilkinson v. Coverdale*, 1 Esp. 75. In the latter case Lord Kenyon held, that a failure to procure a proper indorsement on a fire policy, whereby plaintiff was deprived of the benefit of the insurance, was actionable negligence in the seller of a house who had voluntarily undertaken to get the policy renewed for the plaintiff.

² *Thorne v. Deas*, 4 Johns. New York Rep. 84: a decision of Chief Justice (afterwards Chancellor) Kent. Judge Duer approves of this decision as a correct exposition of the law, though he remarks forcibly on the hardship which may thus be inflicted on the party who trusts to the promise of the volunteer; Duer, vol. ii. pp. 128-130. See the *Carpenters Case*, Year Books, xi H. iv. p. 33, ed. 1679.

the agent will comply with an order to insure; because the principal is entitled to call the money out of his hands when and in what manner he pleases.

The course
of dealing.

2. Where the merchant abroad has no effects in the hands of his correspondent here, but the course of dealing between them has been such that the one has been accustomed to send orders for insurance, and the other to execute them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice in reasonable time to discontinue that course of dealing.

To insure if
he accepts
bills of
lading.

3. Where the merchant abroad sends bills of lading to his correspondent here, with an order to insure as the implied condition on which he is to accept the bills of lading, and the correspondent accepts the bills of lading, he must obey the order; for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition.¹

The rules thus stated are believed to be as universally observed as they are unquestionably well founded in justice and equity.

Previous
course of
dealing.

Where the obligation to insure arises from a previous course of dealing, and the agent has no funds in hand, it is suggested by Judge Duer that he would be excused from compliance with the order if upon the receipt of it he has just grounds for believing his correspondent to be insolvent.² This may be so, but in practice it will be the safer course for the agent to obey the order, unless his information of his correspondent's insolvency be of such a nature as to leave him no ground for doubt.

Out of the
usual course.

Judge Duer also thinks that, "the obligation to insure, which arises from a previous course of dealing, can only apply to insurances similar to those that the agent had been in the habit of effecting. If the past insurances had all been effected

¹ Per Buller, J., in *Smith v. Lascelles*, 2 T. R. 187, 189, 190.

² 2 Duer, 124.

in a time of peace at a low rate of premium, and requiring in each case only a moderate advance, they would give the principal no right to expect that an order to insure, in a time of war, not accompanied by a remittance of the necessary funds, would be obeyed.”¹ It may be a question how far this would be so held in this country, where an immediate advance in respect of the premium is hardly ever required in practice, at the time of effecting the policy.

There can be no doubt as to another position of the very learned American jurist; “that where the necessary funds for procuring the insurance are remitted to a commission merchant or insurance broker, he is under an equal obligation to apply them to the purpose directed, as where the funds are in his hands when the order is received.”²

Funds
remitted.

It also seems free from doubt that the duty of insuring may be imposed on an agent, even in the absence of express directions to insure, by the usage of the particular trade to which his agency and the insurance relate.³

Usage of
trade.

If an agent is employed by a foreign correspondent to procure an insurance under circumstances which, according to the rules laid down by Buller, J., in *Smith v. Lascelles*, give the correspondent a right to expect such orders will be complied with, total failure to comply, if without notice, subjects the agent to an action for all the loss which his correspondent may have sustained from the non-insurance.⁴ It was his duty to give prompt notice of his refusal to act upon such orders, that his employer might not be deprived of the opportunity of effecting the insurance elsewhere; and if, for want of such notice, no insurance be made, he is answerable for the loss arising from his neglect.⁵

Agent bound
to insure is
liable for
neglect.

Unless
prompt
notice.

A merchant in this country received from a merchant

*Corlett v.
Gordon.*

¹ 2 Duer, 125.

² Ibid.

³ Ibid. 127, 128.

⁴ *Smith v. Lascelles*, 2 T. R. 187, ante, p. 170; *Smith v. Price*, coram Erle, C. J., 2 F. & F. 748. See 2

Duer, 120.

⁵ Ibid. Observations of Ashurst, J., 2 T. R. 188. See the general principle in *Prince v. Clark*, 1 B. & C. 186.

Notice of
refusal

abroad, with whom he had no previous connection, a bill of lading, with request to insure the goods; the English merchant not wishing to take to the consignment, but without notice to the consignor that he rejected it, handed over the bill of lading and the order to insure to a creditor of the consignor, who effected the insurance and received the goods, and afterwards became insolvent, with the proceeds in his hands; it was held, that the merchant, who had his election either to accept or reject the bill of lading, was bound, if he did not notify his rejection of it, to comply with the terms of the consignment, and was liable for the consequences of not having done so.¹

Notice of
difficulties.

So also in the event of any difficulty of procuring the insurance on the terms prescribed by the principal, it is the duty of the person employed, in the exercise of that reasonable diligence expected of agents, to give notice of such difficulties to the principal within a reasonable time.

Callander v.
Oelrichs.

The plaintiff, a merchant in this country, had instructed the defendants, who were his commission agents and correspondents in America, to effect an insurance for him on certain prescribed terms (viz., that the insurers should be liable for average losses above 10% per cent.), upon a cargo of wheat shipped by him from London to Baltimore, and consigned to the defendants to be sold and disposed of on commission. The defendants attempted, in vain, to procure an insurance on the terms prescribed, but gave no notice to the plaintiff of their failure, and instead thereof effected an insurance on the usual terms (by which the insurers on wheat are exempted from all liability for average, unless general, or the ship be stranded). The Court of Common Pleas held, that the giving of such notice was part of the common law duty of the defendants, to be implied from their retainer as commission agents with express orders to insure, and that the plaintiff therefore was entitled to recover

¹ Corlett v. Gordon, 3 Camp. 472.

in an action brought against them for the breach of such duty.¹

In this case the damage alleged was, that by reason of the want of notice, the plaintiff had been prevented from effecting an insurance on the wheat on the terms proposed, and thereby precluded from recovering for the average loss; but, as Judge Duer remarks, no proof appears to have been given that an insurance could have been effected on the terms proposed, and unless this was practicable no damage was sustained.²

A foreign principal has a right to expect the same ordinary care, skill, and diligence in procuring an insurance that the principal himself would exercise as a man of common prudence and knowledge of business. With the
considerate
care of a
prudent man.

Hence, where the foreign correspondent of a mercantile firm in this country directed them, as his agents, to procure an insurance for him, prescribing no limit of premium; but they limited the broker to so low a rate of premium that no insurance on such terms could be effected, and they were held liable to their foreign employer for the loss arising from the want of insurance.³ On the same principle, where a policy had been effected, but through the agent's neglect to ascertain the solvency of the underwriters, and his omission to communicate the names of the brokers, by whom it was effected in their own name, a loss on the property was sustained by the insolvency of the brokers and of one of the underwriters, the agent was held liable as if he had underwritten the policy.⁴

On the contrary, if the agent does all that the foreign principal, on the spot, and acting with due care, skill, and diligence as a man of business might reasonably be expected

¹ *Callander v. Oelrichs*, 5 Bing. N. C. 58.

² 2 Duer, pp. 222-225. The question as to the amount of damages was referred.

³ *Wallace v. Tellfair*, 2 T. R. 188, in notis.

⁴ *Hurrell v. Bullard*, coram Cockburn, C. J., 3 F. & F. 445.

to do, he is not liable for the consequences of his failure to procure insurance.

Thus, where the correspondents in London of a foreign merchant, being directed by him to procure an insurance, and having failed to do so at Lloyd's because the ship was not in Lloyd's register, ultimately caused it to be effected with a Newcastle company through the medium of the ship-owners, who afterwards refused to deliver up the policy, or pay over a loss they had received on it from the underwriters, it was intimated to the jury by Buller, J., before whom the case was tried, that this afforded no ground of action against the agents for negligence in effecting the policy.¹ "If," said the learned Judge, "the defendants had made a blunder in effecting the insurance, which would have avoided the policy, that would have been negligence; but the policy is a good one, and it was only owing to the knavery and insolvency of the shipowners that the plaintiffs have lost the benefit of it."

Local
diligence.

At this day, at least, Buller, J., would not be justified in the doubt which he expressed in the same case, whether the defendants, who lived in London, were bound to seek insurance elsewhere than at Lloyd's, as, for instance, at the public metropolitan insurance offices. It seems clear, at all events, that no obligation could be cast upon them to seek insurance beyond the limit of this great mercantile emporium. With correspondents resident in smaller towns, such as Newcastle, Whitby, and the like, the obligation might be different.

In the United States the extent of the obligation to procure insurance has been well illustrated in the following case:—The correspondents in Boston of shippers at Surinam received orders to effect insurance on a valuable cargo on their account. When this order was received the ship was

¹ *Smith v. Cologan*, at N. P., 2 T. R. 188, in notis; the verdict was given partly, if not principally, on the

ground that the foreign correspondent had adopted the agents' acts.

out of time, and the insurance was declined on that ground by the insurers at Boston, to whom the agents had applied on the very day they received the letter. They subsequently tried in vain to effect the insurance at Salem, Newburyport, Portsmouth, and Providence, the principal commercial places within sixty miles. They then wrote to New York for the same purpose, fixing a limit (but a very high one) to the rate of premium; part of the amount was eventually insured there at high premiums (the highest being $33\frac{1}{2}$ per cent.), and the rest could not be done at the limit. An action having been subsequently brought against them for not having insured the whole amount, a verdict was found for the defendants under the direction of the presiding Judge, on the ground that in their prompt endeavours to procure insurance at Boston and the other neighbouring ports, they had extended their efforts, at least, so far as their duty required, and that having done so, they were not liable for having failed in procuring a full insurance at New York, though such failure might possibly have been ascribed to their having set a limit on the premium.¹

In none of these cases does the law require an extraordinary degree of skill on the part of the agent. In inquiries, therefore, as to his liability in cases of loss, the question is, whether the act or omission complained of is inconsistent with that reasonable and proper degree of care, skill, and judgment which persons of common prudence or ordinary ability might be expected to show in the situation and profession of the defendant.²

A reasonable and average degree of skill.

Every policy broker of average capacity, must know that all communications respecting the time of the ship's sailing are material to be submitted to the underwriter.

Communications as to the time of sailing.

¹ *Sanches v. Davenport*, 6 Mass. Rep. 258, cited 2 Duer, 242-244; 2 Phillips, no. 1890.

² Per Tindal, C. J., in *Chapman v. Walton*, 10 Bing. 63.

Hence an insurance broker, for omitting to forward information of this kind to a second broker, who at the wish of the principal was employed to effect the policy, was held liable to the principal for the consequent failure of the insurance; for, although he was to receive no remuneration, he had yet undertaken to employ the other.¹

As to delivery
of a stamped
policy.

Every insurance broker is bound to know all the ordinary formal details necessary to make a sea policy a legally valid instrument.

Hence, a policy broker employed to effect a policy on a ship, having negotiated an insurance with the Newcastle Commercial Insurance Company on the terms directed, was held liable for not procuring a stamped policy, in consequence of which neglect the shipowner was unable to recover against the company for a loss that subsequently took place.²

Statutory
penalties.

Unless the policy is in writing on vellum, parchment, or paper, duly stamped, he is by statute deprived of his legal right to any sum for brokerage or agency, or for his pains or labour in negotiating, transacting or making such insurance, or writing the same, or to recover moneys paid by way of premium or in the nature of premium, and all sums actually paid him by his principal in negotiating, or transacting, or making any insurance contrary to the statute, may be recovered back from him as moneys received for his principal's use.³

All ordinary
and usual
clauses.

Every policy broker, or other insurance agent, is bound, without express directions, to insert in the policy all the ordinary risks and customary clauses which are usual and proper in respect of the contemplated voyage. Thus, as it

¹ *Seller v. Work*, 1 Marshall, Ins. 305. See the remarks of Judge Duer on this case, vol. ii. pp. 202, 203; see also *Maydew v. Forrester*, 5 Taunt. 615, as to the point that, whenever the information concealed is unquestionably material the broker will be

liable; see also as to what constitutes negligence, *Wake v. Atty*, 4 Taunt. 493.

² *Turpin v. Bilton*, 5 M. & G. 455.

³ 30 & 31 Vict. c. 23, s. 16.

was shown to be the invariable practice in all voyages from Teneriffe to London, to insert a clause "giving liberty to touch and stay at all or any of the Canary Islands," it was held that a London policy broker was guilty of actionable negligence in omitting this clause.¹

It has been repeatedly and notoriously decided, that a policy on goods, "beginning the adventure from the loading thereof on board," without any addition, only attaches on goods loaded at the port which is the terminus *a quo* of the voyage insured.²

Commence-
ment of risk
on goods.

So completely is this settled law, that all insurance brokers are bound to know and act on it. Hence, a London insurance broker, being directed to effect a policy for a voyage "from Gibraltar to Dublin," upon goods which, upon his instructions, clearly appeared to have been loaded on board at Malaga, was held liable for negligence in having effected the policy on such goods "at and from Gibraltar to Dublin, beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship."³

The rule which we have been discussing regards what is ordinary, usual, and settled; when we leave this common beaten track, it ceases to be applicable. As Judge Duer well expresses it, "The mistake of the agent, where the practice is unsettled, and the law uncertain, affords no evidence of that want of reasonable skill and ordinary diligence for which alone he is responsible."⁴

Directions that are clear, precise, and intelligible, make the failure of the insurance agent to comply therewith actionable, in so far as they may lawfully be followed.

Directions
clear and
precise, make
default in-
excusable.

¹ *Mallough v. Barber*, 4 Camp. 150. Sel. 106.

² *Robertson v. French*, 4 East, 130; *Spitta v. Woodman*, 2 Taunt. 416; *Horney v. Lushington*, 15 East, 46; *Mellish v. Allnutt*, 2 M. &

³ *Park v. Hammond*, Holt's N. P. 80; *S. C.* 4 Camp. 344; 2 Marshall's Rep. 189; 6 Taunt. 495.

⁴ 2 Duer, 214.

Thus, where clear directions were given by the plaintiffs to the defendants to insure goods and also the premium, and the defendants insured the goods, but not the premium, it was held that they were liable to the plaintiffs for not complying with the order thus far to insure, notwithstanding it also directed them to insure against British capture, which could not legally be done.¹

Directions in writing supersede prior verbal communications.

An agent who has faithfully followed express written instructions, is not liable for omitting a provision which, from the verbal communications of his principal, he might fairly have inferred to be necessary. Thus, a policy broker, who had heard in the course of conversation with the captain, that the ship was to carry simulated papers, followed the written instructions sent him, in which nothing whatever was said as to inserting a liberty to carry them, and was held not to be liable in an action for negligence in not inserting the clause, though the ship was subsequently condemned for carrying such papers.²

In case the orders of the principal are so ambiguous as to be susceptible of two distinct and perfectly consistent meanings, and the agent honestly and fairly assuming one of these to be the intention of the principal, carries out the orders accordingly; he has done his duty, and the principal is bound by his acts.³

What policy will suffice.

Whether the policy effected in the particular instance answers the directions given, or meets the necessities of the case stated in the instructions, is a difficult question of fact upon the evidence that should be considered quite apart from private views on either side, and with reference to the ordinary ways of business men.

¹ *Glaser v. Cowie*, 1 M. & Sel. 52; see also *S. P.* in *Fomin v. Oswell*, 3 Camp. 357.

² *Fomin v. Oswell*, 3 Camp. 357. "The captain," Lord Ellenborough remarked, "notwithstanding his prior conversation, might have resolved not

to carry any such papers; or if he still meant to carry them, might not have wished that a leave for that purpose should have been inserted in the policy."

³ *Ireland v. Livingstone*, L. R., 5 H. of Lds. 395.

A general order to insure seems to be satisfied by an insurance in the form in general use at the place to which the order refers, with regard to such a subject in such circumstances. If the principal wishes to have an insurance in a particular form, or with a particular class of insurers, he should give specific instructions to that effect. In the following case the subject of insurance, it was thought, would have indicated a different course from that which the agent pursued; but the Court held otherwise.

A policy in the general form.

The plaintiff, a merchant of Alicante, sued the defendant, his agent in London, for not insuring the plaintiff's goods agreeably to his directions. The goods were a cargo of fruit, which the plaintiff without other more particular directions gave the defendant a general order "to insure." The defendant effected the policy with the London Assurance Office, where they only insured fruit "free from particular average,"—an exception at that time not to be found in the policies of Lloyd's or the Royal Exchange, although the rate of premium was the same in all three; and the consequence was, that when an average loss happened the plaintiff was precluded from recovering for it on the policy.

Moore v. Mourgue.

The Court held that the plaintiff was not entitled to maintain his action, unless the defendant were guilty of a breach of orders, of gross negligence, or of fraud; and as the verdict of the jury was in favour of the defendant on all these grounds, the Court refused to disturb it. "The plaintiff," says Lord Mansfield, "if he pleased, might have given orders to the defendant not to insure at the London Assurance Office, but at some other office, where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters."¹

It may be said in favour of this decision, that it by no means follows that a policy from a particular office containing

¹ Moore v. Mourgue, Cowp. 479.

unfavourable conditions is not a policy on the best terms, at all events in the hands of an agent, who is not justified in accepting what is doubtful, or expected to undertake a risk by doing something which may be perilous.

Judge Duer commenting on the case says:—"A general order to insure implies a direction to make the insurance on the best terms that the agent, in the exercise of reasonable diligence, will be able to obtain, and binds the agent at least to that degree of diligence that a person of ordinary prudence is accustomed to employ in his own affairs. Certainly no person of ordinary prudence, about to determine on an insurance, would fail to ascertain the usual terms of the respective companies or sets of underwriters to whom he might apply, nor would fail, if the credit of the underwriters was equally solid, to effect his insurance at that office whose terms, at an equal premium, secured to him the largest indemnity. Hence, an agent, who in acting for another should omit to make the same inquiries and pursue the same course, would be chargeable with such a want of reasonable and ordinary diligence as would render him justly liable for a resulting loss."¹

Comber v.
Anderson.

The defendants, London insurance brokers, having received from the plaintiff, a merchant in Liverpool, general orders to insure a cargo of wheat on his account, but no specific instructions as to how or with whom to insure, effected a policy with the Royal Exchange Assurance Company, who at that time left out of their memorandum the exception which makes them liable for an average loss on wheat in case of stranding. In this case there was a stranding and an average loss on the wheat; but the plaintiff, by reason of the form of the policy, could not recover under it. He lay by till some time after the loss had happened, without complaining of the form of the policy effected, and then brought his action against the plaintiff for not having effected such a policy as would

¹ Duer on Ins., vol. ii. p. 231, and see also pp. 229-232.

have secured him an indemnity for average loss in case of stranding.

Lord Ellenborough, as to this part of the case, said: "The plaintiff must be taken to have been cognizant of the existence of the chartered companies and the tenor of their policies. If he wished that the policy on this cargo should not be effected on the terms of the Royal Assurance Company, he ought to have given special directions to the defendants for this purpose; and, at any rate, having been so late in reproaching them with what they had done, he had acquiesced in and adopted the policy which they had actually effected."¹

A question of some importance in relation to the subject of a broker's duty in a particular case has been agitated but not yet authoritatively determined as to the evidence of other persons engaged in the same business as the defendant, whether they may be examined as experts and asked what an insurance broker of reasonable skill would, in their judgment, have done under the circumstances.

Whether experts be admissible witnesses on the question of skill and care.

In the only two cases which have been decided on the express point, the Court of King's Bench and Common Pleas were at variance.²

Accordingly where a merchant in Sydney had shipped a consignment to England, and wrote to the defendants, his correspondents in London, desiring them, if the ship had not arrived in England when they received the letter, to wait thirty days and then effect an insurance on the

Campbell v. Rickards.

¹ *Comber v. Anderson*, 1 Camp. 523. To justify the opinion of the learned Judge as to the effect of delay in complaining, one must assume that the policy was in the hands of the plaintiff some time before the loss happened.

² Mr. Phillips says, and I think in accordance with the spirit of English law and practice, in discussing this question—"A witness is not admis-

sible to testify, and cannot be inquired of specifically, which party should prevail, or, what is identically equivalent; or in other words, directly to instruct the jury what verdict they are to give." 2 Phillips, no. 2112. How much of the question of practice here in dispute is comprehended under this observation remains to be seen.

consignment; and the defendants, after waiting thirty-six days, effected an insurance, telling the underwriters nothing of the thirty days' delay after receipt of the letter; the question put to several brokers and underwriters as witnesses for the plaintiff was: "Whether it was material to have communicated the fact that that letter had arrived in this country thirty days before effecting the insurance?" Lord Denman pronounced the evidence inadmissible, on the ground that the opinion of the underwriters and brokers had been asked, not as to a matter of prevalent practice in their trade, but on a matter of legal obligation, which was itself the very point on which the jury were called upon to pronounce a verdict; viz., whether the fact concealed was or was not material, and ought to have been communicated.¹

Chapman v.
Walton.

In the other case, the plaintiff, a London merchant, employed the defendant to effect a policy on his goods for a voyage "at and from London to St. Thomas's, with leave to call at Madeira or Teneriffe:" which was done. Shortly afterwards the plaintiff received the following letter from his supercargo, who was then at Funchal, in Madeira:—"I have now nearly completed, and expect to sail to-morrow or next day at farthest for the Canaries, from whence, as I have taken more wines here than I at first contemplated; it is my intention, for your government, to visit one or more of the West India Islands, say Barbadoes, St. Kitt's, and St. Thomas; in one or other of which, I am told, I cannot fail of getting a market for the wines, and such part of the cargo as I do not dispose of in the Canaries. I have not sold a single package of linens, but could have disposed of a much larger quantity of cottons. With respect to the linens I have no fear, as in Canary any reasonable quantity is desirable."

¹ Campbell v. Rickards, 5 B. & Ad. 840, 846. Similar evidence appears to have been admitted by Lord Tenterden at Nisi Prius, in the action brought by these same agents for the plaintiff against the underwriters; and in Banco he seemed strongly of

opinion that it had been admitted rightly, saying, "I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject matter of the inquiry." See Rickards v. Murdock, 10 B. & C. 540.

The plaintiff took this letter to the defendant, telling him, "that the voyage was altered, and that he left him the letter to do the needful with." The defendant, upon this, altered the policy, by adding to it a liberty for the ship "to proceed to St. Kitt's and Barbadoes for all purposes," but did not also add any liberty to proceed to or touch at the Canary Islands. The ship was lost at the Grand Canary Island.

At the trial of an action against the defendant several policy brokers were called for the defendant; and the altered policy, together with the bills of lading and invoices, and the supercargo's letter being placed in their hands, they were asked what alterations of the policy a skilful insurance broker ought in their judgment to have procured, having these documents in his possession, and being instructed to do the needful. The witnesses having replied, that they thought a policy broker could have done ample justice to such instructions by effecting the alterations as made, the jury found for the defendant; and on motion to set aside their verdict, on the ground of the improper reception of this evidence, the Court refused to do so, and held the evidence admissible.¹

Tindal, C. J., said, "This action is brought for the want of reasonable and proper care, skill, and judgment shown by the defendant under certain circumstances, in the exercise of his employment as a policy broker. The point, therefore, to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to rest on this further inquiry, viz., whether persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion,

¹ *Chapman v. Walton*, 10 Bing. 57.

an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion with the defendant.”¹

Agent not
liable if prin-
cipal not
damnified.

Two things are requisite to enable the plaintiff to maintain his action against his agent in case of failure of the insurance,—default, namely, of the agent as the cause, and damnification of the principal as the consequence; in other words, there must be a *damnum* to the principal as well as an *injuria* in order to make the agent personally liable. Hence, if an agent fails to procure an insurance, which, if made as required, would be wholly void, the agent is not liable in damages, and this for the plain reason that his principal has not been damnified.² If the neglect complained of be the non-communication of a material fact, the insurance agent may defend himself on the ground that had the fact been communicated it would have been impossible to procure an insurance at the premium limited in the instructions;³ but unless the policy, when made as required, would have been *wholly* void, such a defence as this which we are discussing cannot be set up; as *e. g.* in the case of an agent directed to insure against British capture, for this, if embodied in the policy, would have avoided it only *pro tanto*.⁴

¹ Chapman *v.* Walton, 10 Bing. 63. See 1 Smith's L. C. 555, 572–578, notes to Carter *v.* Boehm. As to the American decisions, see M'Lanahan *v.* Univ. Ins. Co., 1 Peter's Supreme Court Rep. 188; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 79; 3 Kent, Com. 285; Duer, vol. ii. pp. 780–788; 2 Phillips, no. 2112, &c.

² Webster *v.* De Tastet, 7 T. R. 157. The assurance directed to be

made in this case was on slaves, the privilege of transporting which was given to the mate of a slave-ship in lieu of wages: wages being an illegal subject of insurance, the policy, if made as directed, would have been void.

³ Anonymous case before Chambre, J., 1808, cited in Paley's Principal and Agent, 20.

⁴ Glaser *v.* Cowie, 1 M. & Sel. 52.

If an agent at a distance whose duty it is to keep his principal informed for the purposes of insurance, keep back intelligence which is necessary to be communicated at the time of negotiating the insurance, in order that his principal may obtain an advantage in the absence of this information, the policy so effected is void.¹ But in case the non-communication of such necessary intelligence be merely the effect of negligence in the agent, without a fraudulent intention, and the effect thereof does not go to the whole of the policy, but only to an average loss, the Courts have held that the policy is not void save as to the average loss.²

Principal identified with the agent's fraud.

An insurance agent in this form of action may avail himself of any defence that would be open to the underwriters, as *e. g.* breach of warranty,³ unseaworthiness,⁴ deviation,⁵ illegality,⁶ and the like; the only exception to this rule being, that the agent cannot, of course, take advantage of any defence founded on his own act or default.

Same defences for agent as for underwriters.

The defaulting agent's liability in such actions is, as a general rule, co-extensive with what the underwriter's would have been if sued on such a policy as ought to have been effected; so that he is entitled to deduct the premium, and the one-half per cent. on the amount of loss, whenever such deduction might have been made by the underwriter.⁷

Extent of liability.

It may happen that the agent, in actions for negligence, is liable beyond the amount for which the underwriters would be liable on the policy.

It may sometimes be greater.

¹ Proudfoot *v.* Montefiore, L. R., 2 Q. B. 511; Fitzherbert *v.* Mather, 1 T. R. 12.

² Gladstone *v.* King, 1 M. & Sel. 35; Stribley *v.* Imperial Mar. Ins. Co., 1 Q. B. D. 507. *Sed quære.*

³ Alsop *v.* Coit, 12 Mass. Rep. 40, cited 2 Duer, 325; 2 Phillips, no. 1904.

⁴ Miner *v.* Tagart, 3 Binn. 204;

cited Duer & Phillips, loc. cit. supra.

⁵ Delaney *v.* Stoddart, 1 T. R. 22.

⁶ Webster *v.* De Tastet, 7 T. R. 157.

⁷ Harding *v.* Carter, 1 Marshall, Ins. 309; Delaney *v.* Stoddart, 1 T. R. 22; Wilkinson *v.* Coverdale, 1 Esp. 75; Glaser *v.* Cowie, 1 M. & Sel. 52.

This may be for the costs of a previous action on the policy when brought at his desire or with his concurrence; and so it seemingly may be when the action on the policy, though brought without his concurrence, is defeated by some misconduct of his in effecting the insurance not disclosed to his principal until action brought:¹ not so, however, where the principal knows of the invalidity of the insurance and the misconduct of the agent, before suing, unless the suit be at the agent's request. Thus, where the principal sued the underwriters, although he knew that they had refused to pay on the ground that the agent had concealed a material fact, Lord Eldon would not suffer him to charge the agent with the costs, as the action was not necessary to entitle the principal to recover, and did not appear to have been brought at the desire or with the concurrence of the agent.²

Insurance brokers were sued for negligence in not having communicated certain material letters to the underwriters, whereby the plaintiff, their principal, had failed in two actions on the policies, and incurred costs to a large amount in addition to very heavy losses. It appeared that the plaintiff had since offered the defendants permission to try on his behalf as many other actions as they liked on the policies, and that, on this offer being declined, he at once, without further communication with the defendants, paid back to certain of the underwriters the losses which they had paid over to him without suit. It was held that the plaintiff had a right so to do without waiting to resist an action at the suit of these underwriters, and that, having done so, he had a right to recover from the defendants the amount of the losses, so paid over, in addition to his other losses and costs of action.³

Is entitled to
the fruits of
abandonment.

Judge Duer raises the question, whether, in cases of constructive total loss, it is necessary, in order to charge the

¹ 2 Duer, 330; this may sometimes be the case where the underwriters' ground of defence is concealment or misrepresentation by the agent.

² *Seller v. Work*, 1 Marshall, Ins. 305, 306; Duer, *ubi supra*.

³ *Maydew v. Forrester*, 5 Taunt. 615.

agent in an action for negligence with the whole amount that would have been due under the policy, to vest the remains of the property in the agent by abandonment: he concludes, that it is,—on grounds every way reasonable, seeing the principal is entitled in law against the defaulting agent to the extent and in form as if he were the underwriter on a valid policy such as ought to have been effected.¹

So much for the duties of the insurance agent in effecting an insurance. If the agent, after the insurance is effected, as generally happens, retains the policy in his own hands, another class of duties is imposed upon him, his negligence or unskilfulness in the discharge of which may also make him liable to the assured.

Duties, when entrusted with policy.

Generally speaking, the agent so entrusted with the policy is the substitute for the assured in all the relations of the latter with the underwriters, and has cast upon him in that capacity the duty of enforcing the rights and protecting the interests of his principal in all matters arising out of the contract of insurance.² Thus, according as circumstances require, it may be his duty to demand a return of the premium, or to prepare and submit the proof of a loss, to settle and adjust the amount, and at the proper time collect and receive the various sums from the underwriters and pay them over to his principals; and in case an abandonment is requisite, he must give notice thereof in due time and in proper form. These, in this country, are the duties usually discharged by professed insurance brokers; and they will equally be expected of any mercantile commission agent who

Duties enumerated.

¹ 2 Duer, 326, 327.

² 2 Duer, 245. "Perhaps," says Blackburn, J., "it may be put as high as to say that he is clothed with authority to do all that is incidentally necessary for carrying out the contract in the policy thus left in his hands,—see Richardson

v. Anderson, 1 Camp. 43 n., and *Goodson v. Brooke*, 4 Camp. 163. I do not wish to be understood as giving a decided opinion that he has so much authority, but there are at least grounds for so contending;" *Xenos v. Wickham*, 33 L. J. (C. P.) 13, 21.

chooses to place himself in the same responsible relations to his principal.

To collect and pay over.

One of the most important of these subsequent duties of the insurance agent is to collect, receive, and promptly pay over losses to his principal. In an action against an insurance broker for not having duly called on certain underwriters to settle and pay the loss, there was no other evidence offered of such obligation except that the policy remained in his hands after the loss. Lord Ellenborough said: "If an insurance broker keeps the policy in his hands he shall be presumed to promise that he will collect the sum due from the underwriters on a loss happening, in consideration of the commission he receives for effecting the insurance. Here the broker, if he chose to part with his lien, might have handed over the policy to the assured as soon as it was effected, and his responsibility would then have been at an end; but as he retained it he was bound to use all reasonable diligence to bring the underwriters to a settlement of the loss according to the usage of trade in this respect."¹

Bousfield v. Cresswell.

To give notice of abandonment.

The insurance agent is no doubt bound, as to giving notice of abandonment, by any express instructions received from his principal, and to carry them out with such reasonable skill as may fairly be expected of him. Where, however, he is left to his own judgment in the matter, his liability in an action for not giving due or timely notice of abandonment must depend upon the circumstances of the case.

In the case of principals living abroad, or at too great a distance to be consulted on the matter, the agent having the policy in his hands would be bound in their behalf to give due notice of abandonment where the circumstances are such as require it, or as render this the prudent course. There, if he have done all that his principal, as a prudent, careful, and skilful man of business on the spot, might reasonably be

¹ Bousfield v. Cresswell, 2 Camp. 545. The usage of trade referred to by his Lordship is, that losses ought

to be collected from the underwriters a month after the adjustment, and paid over forthwith to the assured.

expected to do, he has incurred no liability; but if he have failed in this, he is liable for the consequences of his negligence. If the principal lives sufficiently near to be consulted, the agent would always do wisely to refer to him for instructions.

A pledgee of the policy has no implied authority to give such a notice.¹ Pledgee of policy.

If the principal puts himself in communication with his agent, and is in accord with him in what he does, or neglects to do, he cannot recover against his agent for any damage that ensues therefrom. Principal in accord with agent.

When a cargo of wheat from Waterford to Liverpool was on the 28th of January damaged to the extent of 95 per cent., the plaintiff at Liverpool wrote to the defendants in London a letter on the 2nd February, which they received on the 4th, directing them, if any steps could be taken for his interest with the underwriters, "to do the needful," adding, "I should wish to abandon if it be admitted of." The defendants, by return of post, wrote back to say, "that it would be imprudent to say anything to the underwriters without learning further particulars." The plaintiff did not write again till the 9th, when he neither complained of the abandonment not being made nor directed the defendants to abandon, and on the 18th of the same month notice of abandonment was given, but too late.²

Lord Ellenborough held, that no negligence could be imputed to the defendants for not abandoning before the 18th. The letter of the 2nd left it to the defendants' discretion to act as they should think most expedient; and, if he was dissatisfied with their conduct, he ought at once to have said so. Instead of that he lay by till the 9th, and did not even then complain or give them any fresh orders. Had he positively required them to abandon, they would have been answerable for not complying with his request as soon as possible; but he had referred them to their own judgment, and it seemed

¹ *Jardine v. Leathley*, 3 B. & S. 700.

² *Anderson v. The Roy. Exch. Ass. Co.*, 7 East, 38.

as if he himself at the time had thought they acted judiciously.¹

To cancel
policy.

The cancellation of the policy being an act that destroys the relation not only of assured and insurer, but of insurance broker as agent for the assured, cannot for that reason be justified by any supposed authority implied from the existence of that relation or from the fact of the policy being left in the broker's hands, and consequently depends for sanction on the express authority of the principal.²

The agents of
the insurer.

There may be agents to effect sea policies for the assured, and agents to subscribe them for the underwriters. In this latter case they are generally authorized by power of attorney; but it is not requisite that such power should be produced at the trial, if other satisfactory evidence can be given of their authority.

Their authority.

As to what shall be satisfactory evidence in the absence of the written authority, is a point on which there has been a little fluctuation of opinion. Thus, where a broker proved that one Hutchins had subscribed the defendant's name under the policy, that he was in the constant habit of doing so on policies, and had done several for the witness and for others to his knowledge, Lord Kenyon ruled, that this was sufficient evidence to charge the defendant, without the production of the written authority under which he acted;³ but Lord Ellenborough, in a later case, held precisely similar evidence insufficient,⁴ unless it was also proved that the defendant had ratified such subscription, as *e. g.*, by paying losses upon policies so subscribed.⁵

¹ *Comber v. Anderson*, 1 Camp. 523.

² *Xenos v. Wickham* (in error), 14 C. B., N. S. 452; 33 L. J. (C. P.) 13; L. R., 2 H. of Lds. (Eng.) 296.

³ *Neal v. Irving*, 1 Esp. 61.

⁴ *Courteen v. Touse*, 1 Camp. 43, note; and rightly, see 2 Duer, 341, note *a*.

⁵ *Haughton v. Ewbank*, 4 Camp. 88.

A memorandum indorsed on a policy for change of voyage was signed by the agent of an insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it. This was held by Lord Tenterden to be sufficient proof of the agent's authority to sign such memorandums; and that the other policies on which the memorandums had been signed need not be produced.¹

Where a power was given to fifteen persons, "jointly or separately, to sign policies on such ships as they or any of them should think proper," after four of the original fifteen had died, a policy was executed, in the name of the principal, by four of the survivors, and the execution was held to be in pursuance of the authority.²

What is a sufficient execution of a power to sign policies.

Where the power of attorney was to execute policies on which the risk should commence from the day that the ship was accepted by the association, the Court held that the agent had sufficiently complied with this power by executing a retrospective policy (with the clause "lost or not lost"), to commence on the day the ship had been accepted, although, at the time of so executing it, the agent and the assured were both aware that two average losses had, in the meantime, happened on the ship.³

In virtue of a power "to underwrite any policy of insurance not exceeding 100%, and to subscribe the same in his (the underwriter's) name, and to settle and adjust losses," the broker signed a slip for a policy within the terms of the power, and the Court were of opinion that the signature of the broker's clerk to the policy, made in pursuance of the slip, was a good execution of this power, this being a mere ministerial act. There was, however, in the same case, a ratification of this signature by the underwriter.⁴

¹ Brockelbank v. Sugrue, 5 Car. & P. 21; S. C. 1 Moo. & Rob. 102; 1 B. & Ad. 81.

² Guthrie v. Armstrong, 1 Dowl. & Ryl. 248.

³ Mead v. Davidson, 3 A. & E. 303. This case is given *pro quanto valeat*.

⁴ Mason v. Joseph, 1 Smith, 406.

Limited
authority.

The effect of holding out one as an agent to underwrite policies may be countervailed by the usage of the place. A broker who had a written authority to underwrite for not more than 100%. by any one slip, underwrote a policy for 150%. on the same adventure; the principal did not confirm the policy, and the Court held that he was not bound by the subscription, inasmuch as in the place where it was made by the broker, viz., Liverpool, it was common knowledge that such agents had only a limited authority.¹

Authority
to adjust
policies;
and to submit
to arbitration.

An agent with authority to subscribe a policy, has an implied authority to sign the adjustment of a loss.² And one that had been in the habit of subscribing policies and settling losses, was held, by Chief Justice Gibbs, to have an implied authority even to submit a dispute, concerning a loss, to arbitration.³

Some of these were cases of authority implied from the proved relationship subsisting between underwriter and agent. Where the agent derives his authority from express instructions, which profess to define and regulate his duties, he cannot bind his principal by any act which exceeds the limits of such instructions, much less by one that violates or contravenes their contents; unless the principal have in effect held him out to the public as his general agent with a general authority as such.

Authority
of Lloyd's
agents.

Lloyd's agents have no other authority than what they derive from the printed instructions under which they act. By these instructions it is expressly declared that no Lloyd's agent is to make up or sign any adjustment of loss as the

¹ Baines v. Ewing, L. R., 1 Exch. 320.

² Richardson v. Anderson, 1 Camp. 44, note.

³ Goodson v. Brooke, 4 Camp. 163. *Sed quare*. The report referred to no doubt bears out the text, but it is a report *ex relatione* of another, and it

seems to be contrary to Stead v. Salt, 3 Bing. 101; Adams v. Bankart, 1 C. M. & R. 678, confirmed by Hatton v. Royle, 3 H. & N. 500; 27 L. J. (Ex.) 486, that even a partner has no implied authority to bind his co-partner by a submission to arbitration.

representative of the underwriters; where, therefore, such an agent in a foreign port, signed a certificate that certain sugars were damaged over 5 per cent., the Court held that he had exceeded his authority, and that the certificate so given was not binding on the underwriters.¹ By the same instructions, no Lloyd's agent "is to accept an abandonment as the representative of the underwriters;" and although such acceptance of an abandonment by a Lloyd's agent seemed in one case to have been regarded as binding in the Common Pleas,² Lord Tenterden remarked, that in the case referred to, the instructions to Lloyd's agents could not have been before the Court.³

We have been considering the rights and liabilities of insurance agents on the part of the assured and of the insurer, as governed by the general principles of the commercial law. But there are usages of trade which cannot be overlooked in a treatise such as this, especially as these very usages are recognized in the Supreme Court. The usage of the metropolis has introduced certain modes of transacting business between the brokers and underwriters of London, apparently intended to facilitate business on an extensive scale, by substituting credits for payments, but one effect of the system has been to complicate in law the relations subsisting between the assured, the broker, and the underwriter.

Considered
in relation to
Business
Usage.

The general course of the business of marine insurance, as actually carried on in London and the more important towns of this country, is briefly but comprehensively described by Bayley, J., in these words:—"According to the ordinary course of trade between the assured, the broker,

Course of
business in
London
between
assured,
broker, and
underwriter.

¹ *Drake v. Marryatt*, 1 B. & C. 473.

there reported at p. 155.

² *Read v. Bonham*, 3 B. & B. 147. See the dicta of Burroughs, J., as

³ Lord Tenterden in *Drake v. Marryatt*, 1 B. & C. 473.

Legal relation of the parties and their broker.

and the underwriter, the assured does not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, who is a middleman between the assured and the underwriter. But he is not merely an agent: he is a principal to receive the money from the assured, and to pay it to the underwriters."¹

Rule of law

Hence the general rule of law is, that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for losses.

If we enter a little more minutely into the subject, the following will be found to be the actual course of practice at the present time, altered in one point from what was the practice of a remoter period.

Slips.

The broker on receiving orders from his principal to effect an insurance, prepares a slip embodying the terms of the proposed policy. In the case of private underwriters at Lloyd's, it is the custom to have but one slip, which is initialed by the different underwriters for the amounts for which they are willing to become insurers, and a policy is subsequently prepared by the broker of the assured and taken by him to the different underwriters in succession for execution. In the case of insurance companies a separate slip is always prepared for each company by the broker of the assured, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.²

Accounts.

The broker now keeps two accounts with underwriters,

¹ In *Power v. Butcher*, 10 B. & C. 329, 340.

14 C. B., N. S. 452; 33 L. J. (C. P.) 13, and the judgment per Blackburn, J., *ibid.*

² See *Xenos v. Wickham* (in error),

respectively called the Credit and the Cash Account. Till within a few years back only one account was kept, which was that now called the Credit Account. When the slip for any particular policy is signed, it is arranged between the broker and underwriter whether the premium is to go into the Credit Account or the Cash Account. In either case, the broker becomes debtor to the underwriter for the premium at once, but the time and manner of payment are different in the two cases.

If the premium goes into the Credit Account, it is not Credit. payable till the end of the year. If before the end of the year any claim arising on one of the policies in the Credit Account is adjusted by the broker and underwriter, the broker has credit in the account against the underwriter for the amount of the loss thus adjusted, if the account is good for that amount; and at the end of the year, and not till then, the balance on the account, and the balance only, is due in cash from the broker to the underwriter under a discount of 12% per cent.

If the premium instead of going into the Credit Account Cash. goes into the Cash Account, the custom is the same, except that the account is settled, and the balance is due in cash at the end of the month instead of the end of the year, and the balance is paid under a smaller discount. In either case the cheque is not passed till several days after the balance is struck, and in both cases the broker receives credit on the account for a commission or brokerage of 5% per cent. on the premiums, and 10% per cent. for ready money.¹

The result in law of this system of dealing is thus put by Effect in law. Lord Wensleydale: "The broker gives the underwriter Parke, B. credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so

¹ *Beckwith v. Bullen*, 8 E. & B. 452; *Baring v. Stanton*, 3 Ch. D. 685; cited per Blackburn, J., in 502; *Great Western Ins. Co. v. Xenos v. Wickham* (in error), 33 Cunliffe, L. R., 9 Ch. App. 525. L. J. (C. P.) 13, 19; 14 C. B., N. S.

becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit on account by the broker to the underwriter, and of the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment.”¹

“If the opinion of that very learned judge,” says Blackburn, J., “required any confirmation it would be furnished by the universal practice by which premiums are recovered by the assured under the count for money had and received, without any reference to whether or not the year during which the broker generally has credit has run out, so as to make them payable in cash by the broker to the underwriter.”²

Accounts
between
broker and
assured.

The broker also keeps an account current with the assured, in which he debits him for all the premiums, and credits him for all the losses which may be due upon the various insurances effected by his orders. At the expiration of the month allowed the underwriter after the adjustment of a loss, the amount due from the broker to the assured in respect of such loss is ascertained by deducting all the premiums with which he is debited in his general account with the broker up to that time, from the sum payable in respect of the loss, and such amount is then generally paid him by the broker's accepting a bill at three months for the balance. If, however, the dealings between the assured and the broker are very extensive, the balance, instead of being thus paid, is frequently carried on into the general account.³

Commissions
del credere.

For greater security to their customers, insurance brokers frequently guarantee the solvency of the underwriters. This exposes them to greater hazard, and of course entitles them to a higher, or as usually it is, an additional, commission

¹ Per Parke, J., in *Power v. Butcher*, 10 B. & Cr. 329, 347.

13, 18; 14 C. B., N. S. 452.

² Per Blackburn, J., *Xenos v. Wickham* (in error), 33 L. J. (C. P.)

³ *Stewart v. Aberdein*, 4 M. & W. 211.

upon the business they perform. In such cases the brokers are said to act *del credere*, and the per-centage which they are entitled to receive is called a commission *del credere*. This commission they are legally considered to be entitled to immediately upon entering into the contract, without waiting to see whether such guarantie do in the event subject them to loss.¹ "The commission," said Lord Ellenborough in such a case, "was earned and to be paid to the party for entering into the contract of guarantie, and not in respect of the event, which was perfectly collateral."²

In the common forms of policy the underwriter expressly acknowledges receipt of the premium from the assured—"confessing ourselves paid the consideration due unto us for the assurance by the assured." It is now clearly established that this acknowledgment, except in cases of manifest fraud, is conclusively binding on the underwriter, precluding him alike from suing the assured himself for unpaid premiums credited in his account with the broker, or from setting off such premiums to an action brought by the assured himself on the policy.³

Rights and
Liabilities
as between
Assured and
Underwriter.

Receipt
clause.

If the policy contains no such acknowledgment as that found in the common printed form, but instead of it a covenant or agreement by the broker to pay the premium to the underwriter, the Courts will not imply a contract by the

Broker's con-
tract to pay.

¹ Caruthers v. Graham, 14 East, 578.

² Ibid. As to the general law relating to the liability of *del credere* agents, the reader is referred to a masterly exposition of the subject by Judge Duer, who, as usual, collects, and exhausts all the authorities; 2 Duer, 331-339, especially 337, in notis.

³ Dalzell v. Mair, 1 Camp. 532; De Gaminde v. Pigou, 4 Taunt. 246. In the first of these cases, which was by the assured against the underwriter,

to recover back a premium where the risk had never attached, Lord Ellenborough said, "I should completely knock up the insurance business if I were to allow this acknowledgment [in the policy] to be impeached." In the second, which was an attempt by an underwriter, in an action by the assured, to set off premiums, Heath, J., said: "When the assured is admitted to have paid the premium, it is as between the assured and the underwriter actually paid."

assured to pay the premium to the underwriter in the face not only of this express stipulation, but also of the general usage for the underwriter to look not to the assured, but to the broker as his debtor.¹

In case of fraud.

In case there be fraud on the part of the assured, or collusion between the assured and broker in their dealings with the underwriter, the acknowledgment in the policy is not held binding.²

To recover premiums back.

The underwriter's acknowledgment of having received the premiums, being a bar to his own action against the assured for the same, is also, apart from business usage, legal warrant for an action by the assured against him as for money had and received to recover the premiums back.³ As regards a return of premium, since the title is upon the express contract in the policy, the right of the assured to sue the underwriter is liable to the same considerations that apply to his right of action on the policy for a loss, which we now proceed to discuss.

Return of premiums.

To recover for losses.

If a loss occurs within the meaning of the policy and it is disputed, the question and the rights of the parties in reference to it are in the ordinary course of law complicated in no way by the usages of insurance business.

Adjustment of undisputed loss.

But supposing a loss occurs which is not to be disputed; then, the per-centage (100 per cent. if it be a total loss and a lesser per-centage if an average loss) payable by the underwriters in respect of it is ascertained and indorsed upon the policy with the word "Adjusted" prefixed. The several underwriters, as this indorsement is submitted to them, sanction it with their initials, and this is called the *adjustment*

¹ *Power v. Butcher*, 10 B. & Cr. 329; 5 Man. & Ryl. 327; and see the observations of Bayley, J., at p. 340 of the former, and p. 336 of the latter report.

² *Foy v. Bell*, 3 Taunt. 492; *Mavor*

v. Simeon, *ibid.* 497.

³ Per Blackburn, J., in *Xenos v. Wickham*, 14 C. B., N. S. 452; 33 L. J. (C. P.) 13, 18, ante, p. 196; and *Dalzell v. Mair*, 1 Camp. 532, ante, p. 197, note 3.

of the policy. If the underwriter at the same time passes the loss to the credit of the broker he strikes through his subscription to the policy with his pen, and this is called *striking off the loss*.

Such a mode of settlement is binding by the usage of business upon the broker and the underwriter as between themselves. But whether it be of any binding effect upon the assured, is a question of fact as to his assent to this kind of settlement.

Whether the usage of Lloyd's bind the assured.

We have seen that it is a usual thing for the assured to leave the policy in the hands of the broker. This may be evidence of the broker's authority to do all things ordinarily consequent on the effecting of a policy, even so far as to adjust the loss and to receive the money. But it is no evidence whatever to bind the assured by the peculiar usages of Lloyd's.¹

If the underwriter pays the loss in money to the broker who has the policy in his hands, the underwriter is thereby discharged at common law from any claim by the assured for the same loss.² So he is, if the assured can be shown to have actually assented to the usage at Lloyd's in striking off the loss;³ or if, from all the circumstances of the case, he must reasonably be presumed to have acquiesced in it.⁴

What discharges the underwriter as to the assured.

The question involved in this is not appreciated in all its importance until the bankruptcy of the broker threatens one of the two other parties to the insurance with serious loss. Very strict views of the broker's authority, under any circumstances whatever, were at one time entertained by the judges, much to the prejudice of the underwriter.⁵ The

¹ As to this, see post, p. 200.

² *Scott v. Irving*, 1 B. & Ad. 605.

³ See *Bartlett v. Pentland*, 10 B. & C. 760.

⁴ *Andrew v. Robinson*, 3 Camp. 199.

⁵ See the case before Lord Ellenborough of *Jell v. Pratt*, 2 Stark. N. P. 67; and the cases before Lord Tenterden of *Todd v. Reid*, 4 B. & Ald. 210; and *Russell v. Bangley*, *ibid.* 395.

leaning of the Courts, however, speedily altered. The right of the assured in such cases to recover from the underwriter is now a pure question of evidence, and depends solely upon the point whether the assured, upon a view of all the facts, must not be taken to have been cognisant of the usage and an assenting party therefore to its observance.¹ For the usage of Lloyd's as to settling losses in account being "the usage of a particular place, or of a particular set of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage and adopt it."²

Instead of attempting to define or even describe what evidence would suffice to show that the underwriter is discharged by a settlement according to the usage at Lloyd's, it will be of more practical use to set out the exigency of the law when applied to the circumstances of such a case. This is very strikingly done by Bramwell, B., in the following terms, delivering his opinion in the case of *Sweeting v. Pearce*:—³

Common law
and Lloyd's
usage con-
trasted.

"This is a question," says the learned judge, "of the broker's authority. The legal presumption of authority given to a person who is to receive satisfaction for another for a money demand, is that he is to receive it by payment of money only. It is also a rule of good sense. The custom [*i.e.* of Lloyd's] set up is that the persons who are by legal presumption to receive in money, and in money only, are not to receive in money. The custom is therefore in contradiction to the authority given to the agents by their principal. It is a custom not to do the thing which the law implies they are to do. That shows it to be unreasonable" (*i.e.*, if it were to be supposed to be binding on a person ignorant of it and consequently not assenting to it).

"There is a great distinction between it and the cases

¹ *Bartlett v. Pentland*, 10 B. & C. 760; *Scott v. Irving*, 1 B. & Ad. 605; *Stewart v. Aberdein*, 4 M. & W. 211; *Sweeting v. Pearce*, 9 C. B., N. S. 534; 30 L. J. (C. P.) 109.

² Per Lord Tenterden, in *Bartlett v. Pentland*, 10 B. & C. 770.

³ *Sweeting v. Pearce* (in error), 9 C. B., N. S. 534, 540; 30 L. J. (C. P.) 109, 113.

which have been relied upon. If I set a man generally to do a thing, a custom may well apply to regulate the mode of doing it. So, with regard to usages of the Stock Exchange which have been referred to. If I tell a broker to purchase such and such stock, I impliedly say to him, deal upon terms upon which you can deal, that is, according to the usage. If the tenor of my authority is to exclude the operation of any custom, I give him no authority to act according to the custom; but if the authority I give is consistent with the custom, then the custom may come into play. Thus, in the case before us, the plaintiff [who was ignorant of the usage at Lloyd's and consequently non-assenting to it] says to the broker 'receive payment in money;' that means receive it in money and not otherwise.

"It has been said that 'it might have been considered not a very violent presumption that all parties resident in this country employing brokers to effect policies for them in the common course of business should be considered to have done so with reference to the usages established at Lloyd's.' I beg leave to say that I think it would have been an unreasonable presumption. I can well understand, if a man who knows of this usage of Lloyd's gives his policy to the broker, with directions to do the needful, a jury might well find that he authorizes the broker to do the needful according to the custom. But it would be a question for the jury in each case whether the presumption that the authority to receive payment in money was rebutted by the principal's knowledge of the custom. This custom, in truth, goes not to say how the presumed authority to receive payment in cash is to be exercised, but that it should not be exercised at all."

The result of these remarkable observations of the learned Judge is that the presumption of law as to the cases is directly contrary to the usage at Lloyd's, and that this usage is not allowed to be binding in any case unless there be facts evidencing assent on the part of the assured sufficient to rebut that presumption. Result.

*Sweeting v.
Pearce.*

The case in which these observations were made was singularly suitable to bring out the definite relation, *i.e.*, of antagonism, sustained by Lloyd's usage to the general law of the country. The London brokers had become bankrupt after debiting the underwriter with the loss as against a large sum due to him from them on account of premiums. This was in accordance with the usage, and would have been a bar to the action of the assured against the underwriter, if the usage were binding on the plaintiff. It was admitted however, by the defendant, in accordance with the plaintiff's evidence, that the policy being in the hands of the brokers for safe custody only, the ship's papers were delivered to them after the loss for no other purpose than to obtain an adjustment. The plaintiff was ignorant of Lloyd's usage, and had not intended his brokers should even receive the money in payment for the loss. Under these circumstances it was determined in the Court below, and affirmed by the Exchequer Chamber, that the general law, and not the usage at Lloyd's, governed the case and entitled the plaintiff, notwithstanding the settlement with the broker, to recover against the underwriter.¹

*Bartlett v.
Pentland.*

In *Bartlett v. Pentland*, the plaintiffs, corn merchants in Plymouth, had a policy effected for them by a London broker with the St. Patrick's Insurance Company at their office in Lombard Street, London; a total loss having taken place, a pen was struck through the company's subscription to the policy, and the loss passed in account, as between broker and underwriter, in the usual way, the company being at that time indebted to the broker on the general account between them. The plaintiffs, although in the habit for thirty years of procuring insurances, were yet unacquainted with the usage at Lloyd's, and were misled by a false request of the broker to draw on him instead of the underwriter three months' bills, which he accepted but never paid, having

¹ *Sweeting v. Pearce*, 7 C. B., error), 9 C. B., N. S. 534; 30 L. J. N. S. 449; 29 L. J. (C. P.) 265; (in (C. P.) 109.

failed before they became due. Previous to his bankruptcy, the insurance company, which had all along been indebted to him on the general account between them (including many transactions besides the policy in question), settled such general account with him, by paying in money the balance due to him for losses, including the loss in question, after deducting the amount of the premiums due to them from the broker. The question in the case was whether such settlement with the broker was binding on the assured, as being in law a payment to him.

The Court were clearly of opinion that there was nothing in the case before them to raise any presumption against the plaintiff, that he had given an implied authority to the broker to settle according to Lloyd's usage;¹ and consequently that the money paid to the broker, being not a specific payment on account of a specific loss, but merely a general payment on a general account, was not to be deemed in law payment as against the assured.²

When payment not a discharge.

They further held that, notwithstanding the plaintiffs had been induced to give credit to the broker, and had not applied to the company until after the broker's failure when the company had already settled their general account with him, yet, as the company had not been damnified by the laches of the plaintiffs, they could not be discharged by it.³

When laches is a discharge.

In the next case of the same kind, the plaintiff, a merchant in Glasgow, had employed a London broker to procure an insurance for him at Lloyd's. A total loss having occurred on the policy, the plaintiff wrote to the broker, enclosing a bill drawn on the broker, payable ten days after sight, and stating that he did not know at what date it was proper to draw for the balance, this being the first total loss

Scott v. Irving.

¹ *Bartlett v. Pentland*, 10 B. & C. 760.

² Per Bayley, J., *Bartlett v. Pentland*, 10 B. & C. 773; and see *Scott v. Irving*, 1 B. & Ad. 605; and *Mac-*

farlane v. Giaunocopulo, *infra*.

³ Per Lord Tenterden, C. J., 10 B. & C. 770; accord. per Curiam, *Macfarlane v. Giaunocopulo*, 3 H. & N. 860; 28 L. J. (Ex.) 72.

he had ever had in London. The Court upon these facts held that the plaintiff was not cognisant of the usage of Lloyd's so as to be precluded from suing the underwriter even two years after the broker's insolvency; but that to the extent of a payment made in cash by the underwriter to the broker within the month on account of this loss the underwriter was discharged as against the assured, since the payment made was in strict accordance with his general authority to the broker.¹

Stewart v.
Aberdeen.

In the next case the plaintiffs were merchants at Liverpool, who, for a long course of years, had employed the same firm of London brokers to effect their insurance business in London, which was of a very extensive character. The London brokers kept both a general and also an insurance account with the plaintiffs, in the latter of which they debited them with all premiums, and credited them with all losses allowed in account by the different underwriters; and the balance, after deducting the premiums, was then carried into the general account with the plaintiffs. Some evidence was given that Lloyd's usage was well known in Liverpool. A loss on a policy effected with the defendant, who was an underwriter at Lloyd's, was settled and passed in account as between the brokers and the defendant in the usual way, and the defendant's name was struck off the policy. An adjustment of this and other losses having been obtained by the brokers, they advised the plaintiffs (to whom they were then considerably indebted on the general account) of the fact; and the plaintiffs then drew upon them for the amount. Shortly after this the London brokers, who were still greatly indebted to the plaintiffs, became bankrupt, and the plaintiffs thereupon immediately sued the defendant for the loss already mentioned as passed in account with the brokers. But the Court held that, under the circumstances, the plaintiffs' claim could not be supported, on the ground stated by Lord Abinger, "that there was sufficient evidence

¹ Scott v. Irving, 1 B. & Ad. 605.

in the case of the knowledge of the plaintiffs of the custom, and of their authorizing the brokers to settle with the underwriters, desiring them to credit the plaintiffs with the loss, and to permit them to draw on the brokers for the amount.”¹

The following propositions seem to embrace the law on this subject :—

Summary of
the law on
this point.

1. Unless the assured by evidence reasonably sufficient can be shown to be cognisant of this usage of settling losses in account and to have assented to it, he is not bound by it; but may recover against the underwriter, although the loss has been passed in account, as between broker and underwriter, and the name of the latter struck off the policy.

2. Payment in cash by the underwriter to the broker of the balance of a general account is not payment as against the assured if ignorant of Lloyd's usage. But a specific money payment by the underwriter to the broker in respect of the specific loss claimed by the assured in the action, and within the time appointed for cash payments, is, as against the assured, payment *pro tanto*.

3. If upon the facts of the case it is to be inferred that the assured was cognisant of this usage and assenting to it, he is bound by it, and cannot recover against the underwriter, whose name has been erased from the policy, losses passed in account as between underwriter and broker.

But the assured may lose his right to recover against the underwriter by suing in the name of the broker, since every defence which is good against the actual plaintiff is open to the defendant. Consequently, a settlement by passing the loss in account with the broker is a bar to the action when it is brought in the broker's name.² But the assured has the right of action in his own name.

¹ *Stewart v. Aberdein*, 4 M. & W. 211.

² *Gibson v. Winter*, 5 B. & Ad. 96: this is so wherever the action is brought in the name of one in trust

for another (see the observations of Parke, B., in *Wilkinson v. Lindo*, 7 M. & W. 37). So, the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

Relative
rights and
liabilities of
the assured
and broker.

We have seen, in discussing the general duties of the assured's agent, that a broker who undertakes for commission to effect a policy, and does not effect one, is liable to the assured as for breach of contract; that the plaintiff must prove his loss as in an action against the underwriter; and that the defendant, the broker, may avail himself of any defence which the underwriter would in such a case have been entitled to set up.¹

In the usual course of business, the policy is left in the hands of the broker until the adjustment of a loss. This fact alone is *prima facie* evidence of authority from the assured to the broker to act as his agent in all matters arising on the policy—to claim and receive return of premiums for short interest or for compliance with warranties, to adjust and settle losses, and to receive the amount of them in cash, or, if the assured is cognisant of the usage at Lloyd's, to pass them in account—probably, to do all that is incidentally necessary for carrying out the contract in the policy thus left in his hands.²

Broker must
use diligence.

Whenever the assured leaves the policy in the hands of the broker for the purposes just explained, the broker is, in law, presumed to promise, in consideration of his commission, that he will use all reasonable diligence to procure from the underwriter a speedy adjustment and settlement of the loss, and, without delay, to collect and pay over to the assured the sums due. This being the implied contract, if he fail of performance, an action for damages at the suit of the assured lies against him in respect of the breach.³

¹ Ante, p. 184. See *Harding v. Carter*, before Lord Mansfield, 1 Park, Ins. 4; 1 *Marshall, Ins.* 309; *Cahill v. Dawson*, 3 C. B., N. S. 106; 26 L. J. (C. P.) 253; *Turpin v. Bilton*, 5 M. & Gr. 456; *Wilkinson v. Coverdale*, 1 Esp. 76; *Delaney v. Stoddart*, 1 T. R. 22; *Webster v. De Tastet*, 7 T. R. 157.

² See the cautiously expressed opinion of Blackburn, J., in *Xenos v. Wickham* (in error), 14 C. B., N. S. 452; 33 L. J. (C. P.) 13, 21; *Richardson v. Anderson*, 1 Camp. 43, n.; *Goodson v. Brooke*, 4 Camp. 163.

³ *Bousfield v. Cresswell*, 2 Camp. 544.

The broker, after adjusting and passing the loss in account, thereby depriving the assured, when cognisant of the usage, of all legal remedy against the underwriter, is liable to the assured for the amount, as money received to his use, and this, although no proof be given that he has actually received the money.¹

May be sued
for money
received.

The assured, however, may be found, by his subsequent course of dealing, to have waived his right to resort to the broker. In the following case, the brokers, after a loss had occurred, allowed the underwriter's name to be struck off the policy, who credited them in his books with the amount. They did not, however, take credit for it in their own books, and on the underwriter's bankruptcy, which took place soon after, gave notice thereof to the assured, telling him he must prove for his loss under the commission. Six months after this the assured settled an account with the brokers, including the very loss in question, without making any complaint of the erasure of the underwriter's name, or any claim in respect of the loss. Lord Ellenborough ruled, that, under these circumstances, the assured must be considered to have waived his right against the broker, and to have elected to seek his remedy under the bankrupt's commission.²

Unless there
be a waiver
by the
assured.

If an insurance broker, in case of a loss, pays the assured the full amount, in ignorance that before the loss happened one of the underwriters had become insolvent, the money cannot, "on account of the well-known course of dealing between the insurance broker, the merchant, and the underwriter, be recovered back."³

Broker
estopped by
the usage
from recover-
ing back.

A broker in Leith there effected policies on the ship of the defendants, merchants in Liverpool, and, having adjusted an average loss of 68 per cent. under the policies, he rendered in May, 1806, an account to the defendants showing a balance due to them of 170*l.*, which the broker then paid them. Some time afterwards the broker on applying for payment

Broker
estopped by
laches from
recovering
back.

¹ *Andrew v. Robinson*, 3 Camp. 199; *Wilkinson v. Clay*, 4 Camp. 171.

² *Ovington v. Bell*, 3 Camp. 237.

³ *Edgar v. Bumstead*, 1 Camp. 411.

of the average loss thus adjusted failed to obtain it, to the extent of 325%, in consequence of the insolvency of several of the underwriters. After this, namely, in August, 1808, he rendered an account of the loss to the defendants, and sued them to recover back the amount. Mansfield, C. J., said that without resorting to usage, which might be different at Leith and London, he must hold that after so great a lapse of time between the rendering of the two accounts, the plaintiff must be presumed either to have received actual payment of the loss from the underwriters, or to have settled with them in account some way or other. For the purpose of recovering from the defendants, he should have apprised them in August, 1806, of the state of the underwriters; but his silence had deprived them for the space of two years of all opportunity of enforcing the policies.¹

Illegality,
when a
defence for
the broker.

An agent, to whom moneys have actually been paid to the use of the principal, has no right to inquire into the legality of the transactions out of which the payment arose. Hence, where a loss is paid over by the underwriter to the broker, the latter cannot, to an action by the assured to recover the money, set up the illegality of the insurance.² But where the money is not paid, the amount being only allowed in account, as the course of dealing is not suffered to operate in illegal transactions, the money may be always stopped by the principal whilst it is *in transitu* to the person otherwise entitled to receive it; *e.g.*, premiums on illegal insurances may in such a case be stopped by the assured in the hands of the broker.³

He may not
deny his prin-
cipal's title.

An agent cannot dispute the title of his principal; nor shall he, after accounting with his principal and receiving money for him in that capacity, be allowed to deny this, and to aver that the receipt was for some other person.

¹ Jameson v. Swainstone, 2 Camp. Farmer v. Russell, 1 id. 296.
546, in notis.

³ Edgar v. Fowler, 3 East, 222.

² Tennant v. Elliott, 1 B. & P. 3;

An action for money received was brought to recover from an insurance broker the amount of a loss received by him from the underwriters on a policy effected on ship on behalf of the plaintiff, a part-owner and ship's husband. The other part-owners, though they had given no directions to insure for them, gave the defendant notice not to pay the loss over to the plaintiff. The Court refused to set aside the verdict for the plaintiff, because the defendant being employed to insure for the plaintiff's benefit, and having since received the money from the underwriters, must be held to have received it for his use.¹

Roberts v.
Ogilby

Hamond, mortgagee of a ship for 900*l.*, and in that capacity registered as owner, effected an insurance for 2800*l.* on ship and freight, as agent for and by the direction of Flowerden, the actual owner, and his partner, Davidson, and charged the partnership with the premiums. The underwriters paid over a total loss to Hamond, who resisted an action brought by the assignees of Davidson, the surviving partner, to recover the difference between the 900*l.* and the 2800*l.* on the ground that, being sole registered owner, he was not liable at all, or if liable, was so to the executors of Flowerden, and not to the assignees of the surviving partner. The Court overruled both objections, and held that as the defendant had received the money as agent for the partnership, he could not, when it was claimed of him, be permitted to say that he had received it for the benefit of Flowerden alone.²

Dixon v.
Hamond.

Generally speaking, brokers are justified, even after notice, in paying over a loss to the party for whom as principal they effected the policy, unless satisfactory proof be given that the supposed principal effected the policy as agent only.

To whom he
may safely
pay.

The defendants, as brokers, by directions of Brown, the charterer of *The Lady Hood*, effected an insurance for 2000*l.*

Bell v.
Jutting.

¹ Roberts v. Ogilby, 9 Price, 269.

² Dixon v. Hamond, 2 B. & Ald. 310.

on her freight on Brown's account. A total loss having ensued, the defendants collected the 2000*l.*, and, notwithstanding notice of the plaintiffs' claim as owners of the vessel to the benefits of the insurance, they paid the money over to Brown; and the plaintiffs failed in an action to recover it, because there was no evidence that Brown was the plaintiffs' agent in effecting this insurance.¹

Liability of
assured to
broker for
premiums.

As a general rule, the assured is liable to the broker for premiums as for money paid, whether they have been paid over by the broker to the underwriter or not.²

Theory of
this liability.

Parke, B., explains the legal effect of the course of dealing in this way:—"The broker gives the underwriter credit for the premiums when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premiums to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit on account by the broker to the underwriter, and of the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment."³ "If," says Blackburn, J., "the opinion of that learned Judge required any confirmation, it would be furnished by the universal practice by which premiums are recovered by the assured under the count for money had and received without any reference as to whether or not the year during which the broker generally has credit has run out so as to make them payable in cash by the broker to the underwriter."⁴

Where a policy by deed, instead of acknowledging receipt of the premium, contained a covenant from the brokers to pay it, and was expressed to be effected in consideration of

¹ *Bell v. Jutting*, 1 J. B. Moore, 155.

² *Airy v. Bland*, 2 Park, Ins. 811; *Dalzell v. Mair*, 1 Camp. 532; *Power v. Butcher*, 10 B. & Cr. 329.

³ *Power v. Butcher*, 10 B. & Cr. 329, 347.

⁴ Per Blackburn, J., *Xenos v. Wickham* (in error), 33 L. J. (C. P.) 13, 18; 14 C. B., N. S. 452.

that covenant, the Court held, that the premiums not paid by the broker before his bankruptcy to the underwriters could be recovered by his assignees from the assured, not indeed as money paid, but as "money due for premiums for policies caused and procured to be underwritten by the bankrupt."¹

If a broker engages to effect an insurance with such names as should be to the satisfaction of the assured, it is no defence for the assured, after lying by till the voyage is completed, to set up against an action for premiums that the names of the underwriters had never been submitted to him for approval.²

Assured cannot object to policy after voyage ended.

The assured is also liable to the broker for the commission due to him for effecting the policy, which generally amounts to five per cent on the premium.³ If the broker acts under a commission *del credere*, the rate of remuneration is, of course, higher; and this he may recover from the assured forthwith, without waiting for the event on which his liability on the guarantee depends.⁴

Liability of assured for commission.

The policy, when effected, becomes in law the property of the assured who may maintain trover for it, subject to the broker's lien for premiums and commission, or for the general balance of his insurance account. In practice the policy after being effected, is sometimes handed over by the broker to the assured, and afterwards remitted to him by the assured in order to get it adjusted on the occurrence of a loss;⁵ or the broker himself usually is

The Broker's Lien on the Policy.

¹ *Power v. Butcher*, 10 B. & Cr. 329.

² *Dixon v. Hovill*, 4 Bing. 665.

³ *Power v. Butcher*, 10 B. & Cr. 329; 5 M. & Ryl. 327.

⁴ *Caruthers v. Graham*, 14 East, 578.

⁵ A broker after the occurrence of

a loss pledged the policy with another broker for an advance of money to himself, and afterwards the pledgee, *bonâ fide* supposing the other the owner, received for the loss and repaid himself out of the proceeds, and in an action by the assured against the pledgee for money had and received

allowed to keep it in his own possession till the final event of the voyage is determined and the policy is otherwise exhausted.

Whether it
be a general
or only a
particular
lien.

Where the broker is employed immediately by the assured himself, his lien on the policy is for the general balance of his insurance account.¹ If he is employed by some intermediate agent, and he knows that to be the case, he has no lien on the policy in respect of the general balance of account against his immediate employer; but as against that intermediate employer and the principal, his lien in respect of the premiums and commissions on the particular transaction remains good, whatever may be the agreement or practice between them, if he is no party to it.² If, on the contrary, he is ignorant that the policy is not really effected for him by whom he is immediately employed, he may refuse to give it up until he is paid the general balance of his insurance account against his immediate employer.³ "The only question," says Gibbs, C. J., "is whether he knew or had reason to believe that the person by whom he was employed was merely an agent."⁴

It is not necessary in order to deprive the broker of his

to recover the money retained, it was held that the defendant had a lien on the policy for the amount. It was also suggested that the assured had misconceived his remedy—that he should have brought *trover* against the original broker; *Callow v. Kelson*, 10 W. R. *cor. Exch.* 193.

¹ *Whitehead v. Vaughan*, and *Parker v. Carter*, cited in *Cook's Bankrupt Laws*, 547, 7th ed.; see also *Ollive v. Smith*, 5 Taunt. 55 (A.D. 1813), where Gibbs, J., says: "I came to London in 1775; I was pretty early conversant with some business of that sort, and never remember any doubt to have existed in the profession whether a policy broker had a lien for his general balance on the insurance

accounts."

If A. undertake to clear off the lien of the broker by payment, provided he give him the policy in order to collect losses; and it is given over to him accordingly, this is not a promise that must be in writing within the statute of frauds; *Castling v. Aubert*, 2 East, 325; *Williams v. Leper*, 3 Burr. 1886.

² *Fisher v. Smith*, 4 App. Cas. 1; *Hermano v. Mildred*, 9 Q. B. D. 530; 51 L. J. (Q. B.) 604.

³ See the general rule as laid down by Gibbs, C. J., in *Westwood v. Bell*, 4 Camp. 352, 353.

⁴ *Ibid.*; *Cahill v. Dawson*, 3 C. B., N. S. 106; 26 L. J. (C. P.) 253.

general lien against his immediate employer, to show that he had express notice that the party so employing him was only an agent; it is enough if he might reasonably have inferred this from the circumstances proved.¹ It is for the party, however, seeking to take away this lien to make out the affirmative; for in the absence of reasonable proof to the contrary, it will be presumed that the broker believed his immediate employer to be the principal.²

Express notice not necessary to deprive of general lien.

D., at Liverpool, received orders from his principal abroad to effect an insurance on a cargo of fruit, but thinking to effect it more economically in London, wrote to L. there, who employed N. to procure the policy. A loss was afterwards paid on it to N., who retained the whole for his general balance against L.; and D. was sued by his principal for negligence. If L. showed his letter of instructions to N., D. might still be liable for nominal damages for any breach of his duty as agent; if it was not shown, as there would be no fruits of the insurance through the right of N. to retain the money, D. might be liable for damages to the full amount; and whether it was shown or not, was the question sent to a second trial; but whether D. had committed any tort was not determined.³

Cahill v. Dawson.

An English merchant effected a policy for a neutral foreigner, in his own name, but informed the broker at the time that the property was neutral, and the policy was effected with a warranty of neutrality. This was held a sufficient indication to the broker, under the circumstances, that the English merchant was acting as agent, so as to deprive the broker of any lien, except for the premiums and commission due on the particular policy.⁴

Maans v. Henderson.

The plaintiff, abroad, enclosed to Crowgy in England an undorsed bill of lading of certain goods deliverable to

Lanyon v. Blanchard.

¹ *Maans v. Henderson*, 1 East, 335.

106; 26 L. J. (C. P.) 253; *Man v. Shiffner*, 2 East, 523.

² Per Gibbs, C. J., in *Westwood v. Bell*, 4 Camp. 353.

⁴ *Maans v. Henderson*, 1 East, 335;

³ *Cahill v. Dawson*, 3 C. B., N. S.

Snook v. Davidson, 2 Camp. 217.

shipper's order, and directed him to effect an insurance on the goods, and to employ a Liverpool house to sell them for the plaintiff. Crowgy employed the defendant to effect the policy, representing to him at the time that he had authority to indorse the bill of lading, which he accordingly did, to a person named by the defendant. The defendant effected a policy, and upon the occurrence of a loss claimed to retain the proceeds for the general balance on his insurance account with Crowgy; but Lord Ellenborough ruled that he had no right, and the plaintiff recovered the full amount, subject to a deduction for premium and other charges on the particular policy.¹

Westwood v.
Bell.

It appeared that the plaintiff (through several intermediate agencies), had employed Clarkson to effect a policy, and Clarkson instructed the defendants to effect it for himself as principal in the transaction, and the defendants did so "as agents," debiting Clarkson with the premiums; there it was held that the defendants, as against the plaintiff, had a right of lien on the policy so effected, for the general balance of their insurance account with Clarkson.² In such a case the broker may still satisfy his lien, notwithstanding notice before receiving the money of the true relation of the parties to the insurance. But if he after such notice pay over the surplus to his immediate employer, he is still liable for it to the proper principal as for money received.³

Mann v.
Forrester.

Correspon-
dent of mer-
chant abroad.

Any mercantile agent in this country of a merchant abroad has a lien on the policy which he is authorised to effect, for the general balance due to him, or becoming due on his account with his principal, provided the policy remain in his hands.⁴ If he has procured the policy through an insurance

¹ Lanyon v. Blanchard, 2 Camp. 596. Per Gibbs, C. J.: "In Lanyon v. Blanchard, the defendant must be taken to have had notice that the person who employed him was not the principal. The representation made by Crowgy, that he had autho-

rity to indorse the bill of lading, was abundantly sufficient to show that he was only an agent;" Westwood v. Bell, 4 Camp. 353.

² Westwood v. Bell, 4 Camp. 349.

³ Mann v. Forrester, 4 Camp. 60.

⁴ Godin v. London Assur. Co.,

broker, his lien attaches on the policy in the broker's hands, for the broker being his agent, his possession, in contemplation of law, is that of his employer. And the assignee of the policy, who becomes so under special indorsement to him of the bill of lading by the principal, takes it subject to the correspondent's lien; and in case of loss, his claim against the money in the broker's hands is modified accordingly.¹

If the policy be left in the hands of an agent merely as a depositary and for safe custody, he acquires no general lien thereon, although he have afterwards advanced money to the assured without other security than the policy.²

No general lien on policy left for safe custody.

It must be clearly understood that the general lien of an insurance broker is only for the balance of his insurance account, and does not comprehend transactions between the broker and his employer on a distinct account having no relation to insurance.

General lien is only for what?

In cases, indeed, where bankruptcy has intervened, demands, which cannot be made the subject of lien, may frequently be embraced as items of mutual credit; and, in effect, the broker may there avail himself of a substantial benefit, although no lien attaches.³

Secus in Bankruptcy and mutual credits.

Such appears to have been the principle of decision in the case of *Ollive v. Smith*; in the subsequent case of *Rose v. Hart* the doctrine of mutual credit was limited to cases where the credits given must in their nature terminate in debts; but Gibbs, C. J., as the organ of the Court was careful to state expressly that the principle so laid down would support *Ollive v. Smith*, on the ground that in that case "the

1 Burr. 493. This case is reluctantly cited even for the general principles laid down in the course of the judgment. It is not intended by the text or by this authority in the note, to set forth that a factor under promise of a consignment, may ensure and recover his general balance under the policy notwithstanding the goods are sent elsewhere by the shipper before the

loss occurs. See this case considered ante, pp. 118, 119.

¹ *Man v. Shiffner*, 2 East, 523.

² *Muir v. Fleming*, 1 Dowl. & Ryl. N. P. C. 29. This was a case on a life policy, which had been left with defendant, he paying the premiums as they became due.

³ *Ollive v. Smith*, 5 Taunt. 55.

bankrupts were indebted to the defendants, and, being so indebted, delivered policies of insurance to them to collect losses under them, which, when so collected, would make the defendants their debtors for the amount."¹ This defence of mutual credit, however, must be pleaded specially.²

What lien of insurance broker is lost.

The lien of an insurance agent, as in case of every other lien at common law, depends on the continuance of possession. If he voluntarily delivers up the policy to his principal, or to his order, his lien is extinguished; so it is if he parts with the policy wrongfully, as by pledging it as his own; but not so, where it is taken from him by force, or fraud, or parted with by mistake.³

When, though lost, it revives.

As a general rule the lien of the broker revives where the policy comes again into his possession;⁴ but there are excepted cases. If, for instance, when the policy comes again into the broker's hands, he knows or has reasonable grounds to believe that his immediate employer was a mere agent (he having been ignorant of the fact when he before held the policy), it seems that his general lien as against his immediate employer will not revive with the re-possession of the policy to the prejudice of the claims of the party really assured.⁵ If during the time the policy has been out of the broker's possession, it has been assigned over by his employer in good faith, and for a valuable consideration to a third party, the broker's general lien on the insurance account with his

¹ *Rose v. Hart*, 8 Taunt. 499; 2 Smith's L. C. 251; and see as to *Ollive v. Smith*, the observations of Lord Brougham in *Young v. Bank of Bengal*, 1 Moore's Ind. App. Cases, 87; and of *Maule, J.*, in *Dixon v. Stanfield*, 10 C. B. 413.

² *Hewison v. Guthrie*, 2 Bing. N. C. 755.

³ 2 Duer, 289. The learned jurist, as usual, supports these positions by

incontestible authorities.

⁴ *Whitehead v. Vaughan*, Cook's Bankrupt Laws, 547, 7th ed.; *Levy v. Barnard*, 8 Taunt. 149; 2 J. B. Moore, 34, *S. C.*

⁵ *Levy v. Barnard*, 8 Taunt. 149; *S. C.*, 2 J. B. Moore, 34. This was probably the point decided in this case; but it is better with Judge Duer to speak doubtfully on the matter; 2 Duer, 290, 359, 360.

employer would not, it has been held in the United States, revive as against the claim of such assignee.¹

If an insurance broker, having a lien on a policy, be summoned as a witness to produce it under a *subpœna duces tecum*, in an action by his employer against the underwriter, he is compellable to produce the policy; but the Court will, if the plaintiff in such action obtain a verdict, prevent the money from being paid over to him until the broker's lien is satisfied.²

Production of policy under a *subp. duc. tec.*

The general rule, as we have seen, is, that the broker, and not the assured, is the debtor of the underwriter for the premiums. "By the course of dealing," says Lord Wensleydale, "the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor."³

Rights and Liabilities of the Broker and the Underwriters, or Trustee of a bankrupt underwriter.

Generally speaking, however, it is only the broker immediately concerned in effecting the policy to whom the

Which broker.

¹ *Spring v. S. Carolina Ins. Co.*, 8 Wheat. 289, cited 2 Duer, 290.

² *Hunter v. Leathley*, 10 B. & Cr. 858; *S. C.* at N. P., *Lloyd & Welsby*, 125. It appears by the *Nisi Prius* report that the broker, after objection made, produced the policy, "on an assurance from Lord Tenterden, that, if the plaintiffs recovered a verdict, the Court would prevent the money from being paid over to them till the witness's lien was discharged;" *Lloyd & Welsby*, 125. This explains the meaning of what Lord Tenterden is reported to have said in banc. "We do not by this decision" (*i.e.*, that the

broker was compellable to produce the policy) "deprive the party of his lien, he still has the policy in his possession, and has the same right of lien as before;"—his Lordship obviously means that the Court would take care that the broker's lien should be satisfied out of the fruits of the judgment, if it passed for the plaintiffs; if it did not he would, of course, be in the same position as before.

³ Per Parke, J., *Power v. Butcher*, 10 B. & Cr. 329, 347. And per Blackburn, J., *Xenos v. Wickham*, 33 L. J. (C. P.) 13, 17; 14 C. B., N. S. 452.

underwriter can resort for premiums, on the plain principle that it is to him alone he has given credit for them.¹

Defences open
to the broker.

Being thus in the place of the assured, the broker generally has the same ground of defence against the claim for premiums as the assured would have if he had effected the policy without the intervention of a broker.²

Hence, a broker is only liable to the underwriter for premiums due on legal insurances. Therefore, in the case of premiums for re-insurance known to all to be then illegal, where no money had passed, and the assured had enjoined the brokers not to pay the underwriters on the ground of illegality, Lord Ellenborough held that no action could be maintained by the assignees of the underwriters against the brokers for the recovery of the premiums as money paid to the use of the bankrupt.³

If the premiums had actually been paid to the brokers by their employers, in such case the action would be maintainable.⁴

Underwriter
may recover
back monies
improperly
paid.

If an underwriter have, by mistake, paid the broker a foul loss, to which the assured is not entitled, he may recover it back as money had and received to his use, in case

¹ In a case of *Robson v. Wilson*, cited 1 Marsh. Ins. 301, the Court allowed the underwriter to recover against the first broker when the broker that effected the policies for the first had become bankrupt; but the case is far too doubtful to be of much authority.

² Per Lord Ellenborough, 6 M. & Sel. 287.

³ *Edgar v. Fowler*, 3 East, 222, 224. So, where the language of the policy was large enough to comprise an illegal adventure, and it was proved that the assured had contemplated it, the underwriter was held not entitled to sue for the premium which had not been paid by the assured to the broker; *Jenkins v. Power*, 6 M. & Sel. 282.

⁴ In *Tennant v. Elliott*, 1 B. & P. 3, it was held in an action by the assured against the broker, that the defendant had no right to retain as against the plaintiff monies paid to him by the underwriter as the amount of loss on an illegal insurance. This case, as Judge Duer remarks, "proceeds on a rule of universal application, viz., that the person to whom monies have been actually paid to the use of another, has no right to inquire into the legality of the transaction out of which the payment arose." So, *Beeston v. Beeston*, 1 Ex. D. 13; *Re Teignmouth Mutual Shipping Ass. (Martin's claim)*, L. R., 14 Eq. 148; *Duer*, vol. ii. 366-371.

the broker has not already paid it over to his principal. Merely passing it in account with his principal is not equivalent to paying it over, and no answer to such an action; *secus* retaining portion of the money in payment of an adjusted balance due to him from his principal.¹

In considering the right of set-off, it is as well to remember that the contract of marine insurance is still a contract sounding in unliquidated damages, even after an adjustment of a loss under the policy,² and notwithstanding it be a valued policy.³ It consequently follows that any claim for such a loss cannot give a right of set-off under the Statutes of Set-off. Right of set-off.

We have seen that the ordinary relations between the three parties to this contract result in this, that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for losses. It is when the bankruptcy of one of these parties ensues, say the bankruptcy of the underwriter or the broker, that the question of the right of set-off arises, to be determined by the answer to this other question, whether there has been in relation to the policy such mutual credit or mutual dealings between these two parties as can be recognised as being within the Bankrupt Act.⁴ Set-off in bankruptcy.

One of the earliest reported cases was *Wilson v. Creighton*, decided in 1782. It was an action by assignees of a bankrupt underwriter against an insurance agent, for premiums passed in account in the usual way; plea, set-off as to losses and Wilson v. Creighton.

¹ Supposing, *i. e.*, as Judge Duer observes, the circumstances to be such that the broker had a right to revoke the credit he had given to the assured, 2 Duer, 269, note *a.* *Buller v. Harrison*, 2 Cowp. 565; *Holland v. Russell*, 1 B. & S. 424; 30 L. J. (Q. B.) 308; in error, 4 B. & S. 14; 32 L. J. (Q. B.) 297.

² *Castelli v. Boddington*, 1 E. & B. 66; 22 L. J. (Q. B.) 5; *Luckie v. Bushby*, 13 C. B. 864; *Thompson v. Redman*, 11 M. & W. 487.

³ *King v. Walker*, 2 H. & C. 884, in error, 3rd ed. 209; 33 L. J. (Ex.) 167, 325.

⁴ 46 & 47 Vict. c. 52, s. 38.

return of premiums. He had not acted *del credere*, but simply as agent in this country for various foreign correspondents, effecting the policies on goods consigned by him to his principals abroad, to all of whom, except one, he was at the time of action brought, in advance more or less on the insurance account between them. The Court (Lord Mansfield, C. J., Willes, Ashurst, and Buller, JJ.), unanimously held that the losses and return of premiums were not the subject of set-off under the mutual credit clause, because there was no mutuality—the debts were in different rights and due to different parties.¹

Grove v.
Dubois.

The next case in which the question arose was the oft-cited one of *Grove v. Dubois*, 1786, also an action by the assignees of a bankrupt underwriter for premiums. The defendant had effected the policies in his own name for foreign correspondents, unknown to the bankrupt, under a commission *del credere*, being debited in his underwriter's accounts for premiums, and always retained the policies in his own hands. Under these circumstances the Court of King's Bench held, that the defendant had a right, under the mutual credit clause, to the set-off he claimed. "The whole turns," said Lord Mansfield, "on the nature of a commission *del credere*. Then what is it? It is an absolute engagement to the principal from the broker that makes him liable in the first instance."²

Lord Mans-
field on the
effect of a
commission
del credere.

Opinions of
Lord Ellen-
borough and
Sir V. Gibbs.

Lord Ellenborough and Sir Vicary Gibbs, especially the latter, frequently professed their inability to understand the ground of the decision as thus stated by Lord Mansfield;³ they refused, however, to disturb the case, as after it had been long acted upon, that might have been attended with inconvenience; but, on the other hand, they carefully avoided

¹ *Wilson v. Creighton*, cited in 1 T. Rep. 113, and reported 3 Dougl. 132.

² *Grove v. Dubois*, 1 T. R. 112, 115.

³ See 1 M. & Sel. 498; *Koster v. Eason*, 2 M. & Sel. 117; *Baker v.*

Langhorn, 2 Marshall's R. 215; *S. C.* 6 Taunt. 519; *Peele v. Northcote*, 7 Taunt. 478. The American jurists treat the case of *Grove v. Dubois* as clearly overruled on this point by the subsequent authorities; see 2 Duer, 375, where all are collected.

applying it by analogy to other cases, as will sufficiently appear by the following decisions :—

Koster *v.* Eason was an action by assignees of a bankrupt underwriter against brokers for premiums passed in account with the bankrupt, on nineteen policies of insurance; plea by the defendants, who had acted under a *del credere* commission, of set-off as to unadjusted losses due from the bankrupt.

Koster *v.*
Eason.

As to five out of the nineteen policies, the Court allowed the claim of set-off, because these policies had been effected in their own name and on their own account; and as to four others in the name but not on account of the defendants, the Court held that the right of set-off ought to be allowed, because upon these policies the defendants could sue in their own names, and on their own account, provided they had a lien on the policies, or had paid the losses over to their employers; and the bankrupt, by subscribing to a policy so effected, had consented that they should stand as principals, and be considered as giving him credit on the policy at their own risk, and on their own account. The remaining ten were neither in the name nor on account of defendants, and as to these the Court held, on the ground of want of mutuality of credit, that the claim of set-off could not be allowed.¹

An agent who has a lien on a policy, effected in his own name though not on his own account, may set off losses as mutual credits in an action against him by the assignees of a bankrupt underwriter for premiums, even though he has not a *del credere* commission; *e. g.*, the consignees of a cargo, having a lien in respect of bills accepted by them on account of the cargo. "Here," said Lord Ellenborough, "if the parties had not had a lien, their names would have stood on the policy as mere naked names, not coupled with an interest; but they may have an interest not only by a *del credere* commission, but also by a lien."² Accordingly, in a similar

¹ Koster *v.* Eason, 2 M. & Sel. 112.

² Parker *v.* Beasley, 2 M. & Sel. 423, 427.

action against a broker who had effected a policy in his own name on the goods of his principal at his request, the broker having a lien on the goods for a greater sum than that which he claimed to set off in the action, the Court of Common Pleas held him entitled to a right of set-off.¹

In 1858 the principle underlying these decisions was again brought into question in the case of *Lee v. Bullen*. That was an action for premiums by assignees of a bankrupt underwriter against the broker, who pleaded a set-off for return of premiums and for losses. The policies had been effected by the defendant in his own name, he had given the assured a *del credere* guarantee, and continued to hold the policies. Lord Campbell, C. J., said, "Both on principle and according to decided cases, I am quite clear that the facts raised a good defence. There was mutual credit between the parties; the underwriter trusts the brokers for the premiums, and they on the policy trust him that he will fulfil his engagement. The policy being effected in the names of the defendants, and they guaranteeing the solvency of the underwriter, the defendants are not merely nominal contractors, but had a real interest in the contract. This, therefore, is a case of mutual credit, both on principle and the cases decided. *Koster v. Eason* and *Parker v. Beasley* are especially in point as to the construction to be put on the mutual credit clauses as between an underwriter and the person thus effecting the policy."²

Baker v.
Langhorn.

Where, however, brokers, not having a *del credere* commission, effected the policy in their own names, but expressly on the face of it "as agents," and although they retained the policy as security for a debt due to them from the assured, Gibbs, C. J., held, that they could not set off losses in an action by the assignees for premiums. "If," said the Chief Justice, "I underwrite for A. B. in his own name without proof that he is acting for another, I must take him

¹ *Davies v. Wilkinson*, 4 Bing. 573.

² *Lee v. Bullen*, 27 L. J. (Q. B.) 161; 8 E. & B. 692, n.

to be the principal; but if he be acting expressly as agent, I know that he is not the principal, and that any contract I may enter into *with him* is not a contract of insurance."¹ The same Court in a subsequent case decided against the claim to set off where the policy was not effected in the name of the broker, nor had been left in his hands, but he had paid a loss upon it under a *del credere* commission; the Court adding that the mere fact of its having been effected *del credere*, and notwithstanding there was express notice of this on the face of the policy, could not alter the relations of the broker and the underwriter, nor let in the claim to set off; for the guarantie of the underwriter's solvency was *res inter alios* a contract between the broker and the assured, and the broker was paid his commission *del credere* for such guarantie.²

Peele v.
Northcote.

The cases hitherto considered have turned upon the right of the broker to deduct *losses* from premiums; those which follow relate to the broker's right to make a similar deduction in respect of *returns of premium* and depend upon different principles.

Return
premiums
against
premiums.

The amount of premium ultimately paid to the underwriter may very frequently depend on contingencies which cannot for some time be ascertained. For instance, goods coming from abroad are insured at a premium of ten guineas per cent., to be reduced to five if the ship sail with convoy, and to be further reduced in case of short interest; the amount of premium finally payable cannot in such case be ascertained, until it be known whether the ship, in fact, sailed with convoy or not, and whether the interest really falls below the amount insured.

Occasion of
return of
premiums.

Accordingly, the general custom as between insurance brokers and underwriters is, that if at the time of settlement of their mutual account, there be returns of premium pending,

Usage as to,
in settling.

¹ Baker v. Langhorn, 2 Marshall's Rep. 215, 216; 6 Taunt. 519; S. C., ⁴ Camp. 396.
² Peele v. Northcote, 7 Taunt. 478.

the balance of the settled account, instead of being paid over, becomes the first item of account for the ensuing year, and the pending returns of premium, as they successively occur, are carried to the debit of the underwriter in such subsequent account, and the adjusted balance is not paid over to the underwriter until all returns of premium so pending are actually ascertained and deducted.¹

Relation of
the broker
meanwhile.

Until, therefore, the sum to be deducted for returns of premium is ascertained, in other words, until the events are determined, upon which the amount of premium actually payable to the underwriter depends, the broker is the mutual agent of the assured and the underwriters, for the one to pay and for the other to receive.²

Legal conse-
quences of
this relation.

. Either party may, indeed, determine this agency when he pleases; the assured, by taking the policy out of the hands of the broker who has effected it, paying him, of course, what he owes him at the time, and placing it in the hands of another broker to get it adjusted;³ and the underwriter, by at once compelling the broker to pay over the full premium, leaving nothing in reserve in the broker's hands to answer any returns when they shall become due.⁴ If the underwriter do not thus determine it, the broker's agency for the deduction of such returns, under ordinary circumstances, continues; and in that case upon action against him for the full amount of premium, the broker is entitled to set off the amount of returns which as the underwriter's agent he was authorized to deduct.⁵ Consequently, the question as to this right of the broker is *a question of continuing agency*.

In case of
Death or
Bankruptcy.

This agency for the underwriter ceases *ipso facto* by his bankruptcy or death; the broker cannot avail himself of this

¹ See *Goldschmidt v. Lyon*, 4 Taunt. 534.

² Per Lord Ellenborough in *Shee v. Clarkson*, 12 East, 507, 510.

³ Per Mansfield, C. J., in *Minett v. Forrester*, 4 Taunt. 541, 543, note.

⁴ *Ibid.* 544.

⁵ *Shee v. Clarkson*, 12 East, 507.

defence in an action by the assignees of a bankrupt, or the executors of a deceased underwriter, unless the returns of premium have been actually adjusted in account between the broker and the underwriter, before the bankruptcy or death.

Thus, where the assignees of a bankrupt underwriter brought their action against a broker for premiums due on two policies of insurance, in respect of which he claimed to set off returns of premium for short interest; and it appeared that the events which entitled the broker to make this deduction had occurred and become known to him, on the one policy before the bankruptcy; on the other policy, not till after that event; but that no adjustment had been made on either policy:—the Court held, that, as the agency of the broker had been determined by the bankruptcy of the underwriter, he was not entitled to this set-off either on the one policy or on the other.¹

Minett v.
Forrester.
Bankruptcy.

The Court of Common Pleas applied the same principles to actions by the executors of a deceased underwriter, and held that no set-off could be allowed in respect of returns of premiums, in case the events entitling thereto were not known till after the underwriter's death.²

Houstoun v.
Robertson.
Death.

In a subsequent case it was decided that all these rules apply exactly in the same way, whether the broker acted under a *del credere* commission or not.³

Del credere
makes no
difference.

More recently the benefit of such a set-off against a claim for premiums by the executors of a deceased underwriter was sought under plea of a custom at Lloyd's to retain all premiums in hand as against the executors of the underwriter until all the risks underwritten by him were *run off*,

Alleged
custom at
Lloyd's to
postpone
payment of
premiums.

¹ Minett v. Forrester, 4 Taunt. 541, 544; Goldschmidt v. Lyon, 4 Taunt. 533. Accord. Parker v. Smith, 16 East, 382.

² Houstoun v. Robertson, 6 Taunt. 448; 2 Marshall's Rep. 138.

³ Houstoun v. Bordenave, 6 Taunt. 451; 2 Marshall's Rep. 141.

that is, were determined or adjusted, but the Court, merely saying that such a custom as against executors and assignees must be inconvenient, if lawful, held upon the evidence in the case, that the existence of the custom was not established.¹

¹ *Beckwith v. Bullen*, 8 E. & B. 683; 27 L. J. (Q. B.) 162.

CHAPTER V.

THE POLICY.

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THE instrument embodying the contract of sea insurance is called a policy of insurance. What a
policy is.

No contract of sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862, 25 & 26 Vict. c. 63) is valid unless it be expressed in a policy.¹

Any carrier by sea or other person who shall, by agreement for an additional sum for freight or otherwise, undertake to insure the goods while on board, must express this agreement in a policy, otherwise it is invalid and cannot be enforced.²

Every policy must specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of these particulars be omitted in any policy, such policy is void to all intents and purposes.³

¹ 30 Vict. c. 23, s. 7.

² Ibid. ss. 12, 7.

³ Ibid. s. 7. *In re The Arthur*
Average Ass., L. R., 10 Ch. App.

542; *In re Padstow Total Loss Ass.*,

20 Ch. D. 137. See ante, pp. 153,

154.

No policy is good or available in law or in equity, unless duly stamped; and on no pretence whatever may it be lawfully stamped after being underwritten, except in these two cases, viz.: (1) a policy of mutual assurance under impressed stamp may, after being underwritten, if not in excess of what the stamp will bear, be impressed with additional stamps or stamp;¹ (2) a policy made abroad, and chargeable with duty under 30 Vict. c. 23, may be stamped within fourteen days after being first received in the United Kingdom.²

Any policy made for any time exceeding twelve months is null and void to all intents and purposes.³

These enactments are further enforced and maintained by penalties against any one becoming an assurer, or as broker or agent effecting or procuring an insurance, except by a duly stamped policy, or making or issuing what purports to be a copy of a policy at a time when no such policy duly stamped is in existence.⁴

Moreover, if the insurance is not expressed in a duly stamped policy, no brokerage or agency, or other sum in the nature thereof, can be legally claimed in respect of it; nor any premiums, or other consideration in the nature of premium, be recovered by the agent or broker against the assured; and all sums actually paid on any such account by the assured to his broker or any person negotiating, transacting, or making any insurance contrary to the Act, may

¹ 30 Vict. c. 23, s. 9. It appeared on the minute books of an insurance club which was being wound up that a loss upon a ship had been reported to the club, and the money due in respect of it raised by the committee, but retained by the secretary till it should be claimed by the personal representative of the deceased member: there the widow recovered as a creditor of the club, although no stamped policy could be produced;

Re Teignmouth Mutual Shipping Ass. (Martin's claim), L. R., 14 Eq. 148.

² 28 & 29 Vict. c. 96, s. 15, is repealed by 33 & 34 Vict. c. 99. The stamping of policies made out of the United Kingdom is governed by the 30 Vict. c. 23; 33 & 34 Vict. c. 97, s. 117; and 44 & 45 Vict. c. 12, s. 44.

³ 30 Vict. c. 23, s. 8.

⁴ *Ibid.* ss. 13, 14, 15.

be recovered back as money received for the use of the assured.¹

Every policy must contain the name or firm of one or more persons interested in the insurance, or of the consignor or consignee, or of the person or persons residing in this country who shall receive and effect the order to insure, or of the person or persons who shall give such order to the agent immediately employed to effect the insurance; otherwise the same is to be null and void to all intents and purposes.²

There are *interest* and *wager* policies, *valued* and *open* policies, *time* and *voyage* policies.

Different designations of.

An *interest policy* is one that shows by its form that the assured has a real, substantial interest in the thing insured; in other words, that the contract embodied by the policy is a contract of indemnity, and not a wager. All the common forms of policy are adapted to transactions of this nature; and every policy is taken to be an interest policy, unless the contrary is clearly expressed on the face of it.³

Interest policies.

A *wager policy* is one that shows on the face of it that the contract it embodies is not really an insurance, but a wager,—a pretended insurance, founded on a fictitious risk where the assured has no interest in any subject of insurance, and can, therefore, sustain no loss by the happening of any of the casualties against which the supposed insurance professes to protect him. Such a wager policy is generally known by having one or other of the following clauses expressed on the face of it:—"interest or no interest,"—or, "without further proof of interest than the policy;"—or, "policy to be deemed sufficient proof of interest;"⁴—or, "without benefit of salvage to the insurer," or some analogous clause, showing that the assured means to give no proof, except the mere production of the policy itself, of his having any interest whatever in

Wager policy.

¹ Ibid. s. 16.

513.

² 28 Geo. 3, c. 56, ss. 1 and 2.

⁴ Murphy v. Bell, 4 Bing 567.

³ See Cousins v. Nantes, 3 Taunt.

the subject insured, and thereby violating directly the provisions of the 19 Geo. 2, c. 37, enacted against such policies on British property.

A valued policy.

A *valued policy* is one in which the agreed value of the subject insured, as between the assured and underwriter, for the purposes of the insurance, is expressed on the face of the policy.

An open policy.

An *open policy* is one in which the value of the subject insured is not thus fixed or agreed in the policy, as between the assured and the underwriter, but is left to be estimated in case of loss.

Hence the chief practical difference between valued and open policies in case of loss is, that in the former, the value is fixed by the policy,—in the latter it must be proved by the production of tradesmen's bills, invoices, bills of shipping charges, surveyor's estimates, and other necessary vouchers. As the value of ship and freight is more difficult to prove in this way than the value of goods, the former interests are generally insured in valued, the latter frequently in open policies.

A voyage policy.

A *voyage policy* is one in which the duration of the risk is for a particular voyage, the limits of which are designated in the policy by specifying a certain place at which it is to begin (called the *terminus a quo*); and another at which it is to end (called the *terminus ad quem*); as, for instance, where a ship is insured "at and from,"—or merely "from—London to Buenos Ayres."

A time policy.

A *time policy* is one in which the limits of the risk are designated only by certain fixed moments of time, at which it is respectively to begin and end: as where a ship is insured "from noon of the 1st day of January, A.D. 1886, to noon of the 1st day of January, 1887."

A mixed policy.

Policies are also occasionally effected which, in form, partake of the nature both of time and voyage policies; as where a ship is insured "from London to Buenos Ayres for six months," or, "from noon of the 1st of January, A.D. 1886, to noon of the 1st of June in the same year, on ship at and from London to Buenos Ayres."

The Forms of Policy employed in different mercantile communities are exceedingly various; the merchants and underwriters of our own country have adhered with persevering tenacity to the venerable old form which was introduced at an early period into England, probably about 1450 A.D., when the practice of marine insurance was being assumed into the hands of English merchants under a powerful feeling of jealous rivalry and opposition to the Lombard traders, who had long settled in London about the street still known by their name and had secured for themselves a monopoly of the business of insurance and exchange.

Our common form of sea-policy.

The form of this instrument to any one not accustomed to use it, may well seem complex and cumbersome, since it has been drawn in the simple phraseology of daily life but with an accumulation of clauses intended to be comprehensive and to meet the requisites of men seeking insurance on any of all the usual subjects exposed to sea perils; yet long use, and a variety of decisions, have now given it such a degree of certainty, and the sanction of the Legislature a second time bestowed upon it¹ seems to impart to it such authority, that it is likely now to be retained among the chief instruments of English commerce.

The following is the statutory form of this policy:—

S.G.	Be it known that [	] as well in	(1) (2) Name
£	[	] (1), own name, (2) as for and in the name and names of	of the
Delivered the day of 186 . }	all and every other person or persons to whom the same doth, may, or shall	appertain, in part or in all, doth make assurance and cause [	assured or their agents.
No.	] and them and every of them to be insured, (3) lost or	not lost, (4) at and from [	(3) "Lost or not lost,"
[STAMP.]	(5) upon any kind of goods and merchandises, and also upon the body, tackle,	apparel, ordnance, munition, artillery, boat and other furniture, of and in the	(4) Voyage insured.
£10,000	good ship or vessel (6) called the [	whereof is master, under God for this present voyage [	(5) Subject insured.
[aggregate of sums insured.]	] or whosoever else shall go for master		(6) Ship and master.

¹ It was printed in the schedule to the 35 Geo. 3, c. 63, and is reprinted in the schedule to the Consolidated

Statute of Insurance Law, the 30 Vict. c. 23.

Delivered on
the day
of

[day on which
issued.]

No. .

[Number of
policy in bro-
ker's account,
where the
stamped forms
are supplied on
credit.]

in the said ship, or by whatsoever other name or names the same ship or the master thereof is or shall be named or called, (7) beginning the adventure (7) Limits of risk.

upon the said goods and merchandises from the loading thereof aboard the said ship [], upon the said ship, &c. [], and shall so continue and endure, during her abode there upon the said ship, &c.; and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at []

[], upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; (8) and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever [] (8) Liberty to touch and stay.

[] without prejudice to this insurance. (9) The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at []. (9) Valuation clause.

(10) Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises and ship, &c., or any part thereof; (11) and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; (12) to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured. (13) And it is agreed by us the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London. (14) And so we the assurers are contented and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators and assigns, for the true performance of the premises, (15) confessing ourselves paid the consideration due unto us for this assurance by the assured [] (11) (12) Sue and labour clause. (13) Binding effect of policy. (14) Promise to indemnify. (15) Receipt clause.

(16) at and after the rate of []; (16) Rate of premium. (17) Attestation clause.

(17) In witness whereof we, the assurers, have subscribed our names and sums assured in []. (17) Attestation clause.

(18) N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded. (18) Common memorandum.

(19) [

£ (sum in figures)	A. B. (sum in words)	day of	A.D.
£ (ditto)	C. D. (ditto)	day of	A.D.
£ (ditto)	E. F. (ditto)	day of	A.D.

 (19) Underwriters' signatures.

(and so on, until the aggregate amount of the different sums subscribed by each underwriter equals the amount required to be insured).]

As this is the form in use at Lloyd's (being commonly called the "Lloyd's Policy"), and very generally among private underwriters throughout the United Kingdom, and has in substance been adopted by the companies, we proceed to consider in their order the common clauses which it usually comprises, and the main requisites which are essential to its validity as a contract under our law.

The clauses considered in detail.

(1.) A policy without the names of the parties by or for whom it is effected is called a policy in blank, and is either prohibited by the laws, or rejected by the practice of all mercantile states.

Names of the assured or their agents.

In our own country the law in terms provides, that no policy shall be effected without first inserting therein "the name or names, or the usual style and firm of dealing," either, 1. Of "one or more of the persons interested;" or, 2. Of "the consignor or consignees of the property to be insured;" or, 3. Of "the person or persons resident in Great Britain who shall receive the order for and effect the policy;" or, 4. Of "the person or persons who shall give the order to the agent immediately employed to effect it."¹

28 Geo. 3, c. 56.

Under the liberal construction put by the Courts of Law upon this Act of Parliament, it has been reduced to a mere prohibition against policies in blank. In practice, accordingly, the name usually inserted in the policy is that of the insurance broker, who insures either in his own name and on his own account, or in his own name and on account of his principals.

In the first case the blanks marked numbers 1 and 2, in printed form, are filled up thus:—

"A. B. & Co. (style of the insurance broker's firm), as well in their own names, as for and in the name and names of all

¹ 28 Geo. 3, c. 56.

and every other person to whom the same doth, may, or shall appertain in part or in all, do make assurance and cause themselves and them and every of them to be insured," &c.

In the second case the blanks are filled up thus:—

"A. B. & Co., as well in their own names, as for and in the name and names of all and every other person to whom the same doth, may, or shall appertain, in whole or in part, do make assurance and cause C. D. & Co. (name or firm of their employers, the parties interested), and them and every of them, to be insured," &c.

If the party interested effects the policy, without the intervention of a broker, he of course expresses himself to have so effected it in his own name and on his own account, as in the first form, merely substituting the name or style of the principal for that of the broker.

Such are the usual modes in which these blanks are filled up in English policies; in practice some slight variation of form occasionally occurs; sometimes, for instance, it is stated on the face of the policy that the party effecting it does so "as agent for," or "at the request of" the principal; but these variations are immaterial.

The party who has thus effected the policy on account of a principal is called "the nominal assured;" the principal himself, for whom it is effected, is called "the party interested," or, "the assured."

Assignment
clause.

(2.) The insertion of this clause, which is invariably introduced into all our common printed forms of policy, is of great importance, as without it no one could take advantage of the policy except the party expressly named in it or his principal;¹ but by the aid of this clause, as we have seen, any assignee of the policy may avail himself of it, who can prove, either that the assignment was after the loss, or, if before, that he was really interested in the subject matter

¹ *Browning v. Provincial Ins. Co.* *Herrn v. Mildred*, 9 Q. B. D. of Canada, L. R., 5 P. C. 263; 530; 51 L. J. (Q. B.) 604, C. A.

of the insurance while the risk was pending, and at the time of the loss. Such an assignee of the policy may now by statute sue in his own name on the policy.¹

(3.) As policies are frequently effected on ships and goods whilst they are in foreign ports, or at sea, it being then uncertain whether they be not actually lost before the policy is effected, these words, "lost or not lost," are inserted as a matter of course. Lost or not lost.

The clause, however, though never omitted, does not appear to be, in all cases, strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an insurance subsequently effected, if both the assured and the underwriters were equally ignorant or cognizant of the loss at the time of the policy being effected.² It has been decided that a policy containing this clause was good, where the subject was accepted for insurance, and the premium paid, before loss, although, until after a loss had happened, to the knowledge both of the assured and the underwriter, the policy was not executed.³ If indeed the loss, at the time of effecting the policy, were known to the assured only, then, on the plainest general principles, the policy would be void; but no case has determined that an underwriter, who chooses to effect a policy with full knowledge that the loss has actually happened, may not be bound by it.⁴

A policy, indeed, containing this clause, is, in the words of Parke, B., "clearly a contract of indemnity against all past

¹ 31 & 32 Vict. c. 86, s. 1; see ante, p. 114.

² See 1 Marshall, Ins. 338—340; 1 Phillips, Ins. no. 925; 3 Kent's Com. 259 and notes; Lord Denman in 3 A. & E. 307; per Bramwell, B., *Stone v. Marine Ins. Co. (Limited)* of Gothenburg, 1 Ex. Div. 81, 85; per Cockburn, C. J., in *Gledstanes v. Roy. Ex. Ass. Co.*, 34 L. J. (Q. B.) 30, 35; *Story, J.*, *Hammond v. Allen*,

2 Sumner's R. 397.

³ *Mead v. Davison*, 3 A. & E. 303; *S. C.*, 4 Nev. & Man. 701. In *Gledstanes v. Roy. Exch. Ass. Co.*, 34 L. J. (Q. B.) 30, the loss of ship and goods was known to both parties before the policy was effected, on which, when advices came forward, the interest was afterwards declared.

⁴ Per Lord Denman in 3 A. & E. 308.

as well as all future losses sustained by the assured, in respect of the interest insured.”¹ Accordingly, on a policy on goods “lost or not lost,” the question was raised by the pleadings whether it was any answer that the plaintiff did not acquire an interest in the goods till after an average loss by sea damage, and the Court held that it was not.³ Such a contract, they considered, “operated just in the same way as if, the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that if the goods, at the time of the purchase, had sustained any damage by the perils of the sea, he would make it good.”³

The voyage insured.

(4.) In the case of a voyage policy, the underwriter cannot know the nature of the risk he is asked to insure, nor, consequently, the amount of premium he ought to require, unless he knows the limits and the character of the voyage on which the ship is to sail or the goods are to be conveyed. In this little clause an accurate description of the voyage insured, the whole course to be actually taken by the ship, the track which she is to pursue through the waters, the straits to be passed, the islands to be left on the one side or the other, the capes she is to double, the reefs and shoals she has to avoid,—all this, in the travelled course of trade and navigation familiar now to the assured and insurer, is impliedly conveyed and stipulated by simply naming the place at which the voyage insured is to begin, and the place at which it is to end, severally called in technical language, the

¹ Per Parke, B., in *Sutherland v. Pratt*, 11 M. & W. 311, 312.

² *Sutherland v. Pratt*, 11 M. & W. 296.

³ *Ibid.* p. 312. “This decision,” says Judge Duer, “does not embrace the case of a total loss by an actual destruction of the whole or part of the goods that are the subject of the contract of sale. Where such a loss has occurred, the purchaser, in proportion to its extent, is exonerated

from his contract, and it is by the seller, not by himself, that the loss must be sustained. As it is not a risk to which he is subject he cannot cover it by an insurance.” Duer, vol. ii. p. 7. Accord. Coleridge, J., in *Hastie v. Couturier* (9 Exch. 109), “If the goods had been totally lost before the contract of purchase was made there would not be an insurable interest, as a person cannot buy a thing that is totally lost.”

terminus a quo, and the *terminus ad quem* of the voyage insured or of the risk.

These termini must be expressed with great care and distinctness in the policy, as any failure herein will, as we shall see hereafter, have the effect of vitiating that instrument.¹ We shall here only mention, by way of explaining the language of the instrument, the distinction between insuring with the words “at and from” a place, and simply insuring “from” it.

An insurance expressed in the policy to be “from A. to B.” only protects the subject insured from the moment of the ship’s sailing from A.;² an insurance “at and from” protects the subject insured both during the time that it is in the port and from and after the time that it sails from it.³ As it is especially desirable, in cases where a ship is expected to arrive at a certain port abroad, to protect her during her whole stay in such port from the moment of her arrival, the form of insurance “at and from,” ought always to be adopted in insuring homeward voyages; indeed, in English policies, from the many advantages it presents, it is the form almost always employed in practice.

What precedes is applicable chiefly, if not entirely, to Time policies. voyage policies; time policies, instead of the termini of the adventure, contain here the limits of the period over which the insurance is to extend.

(5.) It is a rule, founded on very plain principles, that every contract of insurance ought distinctly to specify the subject intended to be insured, whether it be ship, goods, freight, profit, money advanced on bottomry and respondentia, or other interest. The subject insured.

The clause in the common printed form of policy, in which the subject matter of insurance is set forth, is as follows:—“Upon any kind of goods and merchandises, and

¹ Molloy, book ii. c. 11, s. 14, as cited 1 Marshall, Ins. 328. See also *Syres v. Bridge*, 2 Dougl. 527.

² 1 Marshall, Ins. 260.

³ Per Lord Hardwicke in 1 Atkyns, 518.

also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel," &c.

This, in terms, is applicable only to the case in which the same party being interested in ship and cargo, wishes to insure both in one common policy. The origin of it is to be looked for in the earlier ages of maritime commerce, when merchants employed their own ships to carry on their own trade. Now, however, the trade of the shipowner has become a distinct business from that of the merchant; the former considering his vessel, not as an instrument to carry on his own commerce, but as itself a source of emolument; and the latter either hiring of the shipowner a vessel for the transport of his goods on a given voyage, or putting his goods with those of other merchants on board the same vessel, and paying freight to the shipowner for the carriage of them to their port of destination.¹

How this
clause is
rendered
applicable.

This clause, as it stands in the common printed form, is wholly inadequate, without alteration, to meet the exigencies of modern commerce. Yet, instead of providing different forms to meet the various cases of insurance on ship or cargo separately, on freight, on profits, and other interests now held capable of the protection of marine insurance, the English underwriters adhere to the old form; and for the requisite particularity of description resort to the expedient of writing in the body, at the foot, or on the margin of the policy, a statement of the real nature of the subject matter intended to be insured (as *e. g.*, "on profits," "on freight," "on bottomry," "on 100 bales of cotton, marked, &c."), leaving the printed clause entirely unaltered.

The written words thus inserted in the body, margin, or at the foot of the policy, apply indefinitely to the whole instrument, and are considered as controlling the sense of the general printed clause applicable to ship and goods, and narrowing it in point of construction to the particular species

¹ Benecke, *Pr. of Indemnity*, 44, 45.

of interest, whether "ship," "goods," "freight," "profits," &c., the name of which is so inserted.¹ The policy, in fact, becomes a policy on that subject alone; and in suing thereon no notice need be taken (in the statement of claim), of the formal printed clause as to ship and goods.²

"The meaning of this marginal memorandum," says Lord Construction. Ellenborough, in a case where the written insertion was in the margin of the policy, "may be translated thus. We mean to insure the subject so named, 'freight,' for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified."³

Whether the mere indorsement on the back of the policy of such written description of the subject of insurance, without words of reference expressed on the face of it to such indorsement, would have the effect of thus controlling the policy, may be doubted; no question it would do so, if referred to in the body of the policy, or initialed by the underwriters.⁴

(6.) The nature of the risk depending materially on the character of the ship employed, it is of the first importance to the underwriter that the ship to be insured or to carry the property insured, be identified by name and master. Hence, as a general rule, in all insurances, whether on ship or goods, the name of the ship ought to be accurately inserted in the policy. Name of the ship.

Yet if the underwriter really know what ship is intended, since the sole purpose of inserting the name is answered in fact, an error in the name will not vitiate the policy. "Error nominis alicujus navis non attenditur, quando ex aliis

¹ Per Lord Ellenborough in *Robertson v. French*, 4 East, 140; per Lord Penzance, *Dudgeon v. Pembroke*, 2 App. Cas. 284, 293; *Haughton v. Ewbank*, 4 Camp. 82.

² See *Robinson v. Tobin*, 1 Stark. 336.

³ Per Lord Ellenborough in *Robertson v. French*, 4 East, 141.

⁴ See 1 Duer, 76.

circumstantiis constat de navis identitate.”¹ “On ne doit pas pointiller sur le nom du navire, pourvu que l’erreur qui s’y est glissée n’empêche pas d’en reconnaître l’identité.”²

Hence, immediately following the blank left in our common policy for inserting the name of the ship or master, come the words, “or by whatsoever other name or names the same ship or the master thereof is or shall be named and called.”

Insurance on
ship or ships.

As, moreover, circumstances may frequently arise, especially in case of shipments made from abroad, in which the merchant, though desirous of protecting his goods by an immediate insurance, may be utterly ignorant of the particular vessel by which they may be consigned to him, a relaxation of the rule requiring the insertion of the name of the ship in the policy is in such cases permitted; and the party insuring is allowed to effect the policy on his property, “on board any ship or ships,” on condition of declaring, as soon as he becomes aware of it, the name of the ship or ships on board which it has actually been loaded.³

Name of the
master.

Partly for the reason already given, and partly because it is an additional means of identifying the ship from others of the same name, the name of the master ought, if known, to be truly inserted in the policy; yet many occasions arise in the course of the voyage which make it necessary to change the master, and in cases of insurance on “ship or ships” at sea, or from a distant port, the name of the master for the time being may not be known; in our common form, therefore, after the blank left for the name of the master, these words follow, “or whoever else shall go for master in

¹ Casaregis Disc. i. no. 139, cited by Emerigon, c. vi. s. 3, vol. i. p. 160.

² Emerigon, c. vi. s. 3, vol. i. p. 160.

³ The legality of the insurance on ship or ships was declared, so far back as 1794, to be too well established by usage and authority to admit of

dispute; *Kewley v. Ryan*, 2 H. Bl. 348. In France an insurance of this nature is called “assurance in quovis,” and is expressly permitted by the Ord. de la Marine, liv. 3, tit. vi. art. 4, and the Code de Commerce, art. 337. It is ably explained by Emerigon, c. vi. s. 5, vol. 1, p. 173.

the said ship,"¹ and the words already cited, "or by whatsoever other name or names the same ship or the master thereof is or shall be named or called."

(7.) In the statutory form of policy the duration of the risk on ship and goods is described in the following clause, Duration of the risk ;
the blanks in which must be filled up, according to the nature of the adventure which the party effecting the policy wishes to insure :—

"Beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship [at A.] upon the said ship, &c. [at and from A.], and shall so continue and endure, during her abode there upon the said ship, &c., and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at [B.], upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same shall be there discharged and safely landed."

The meaning of this clause, when stripped of its verbiage, is, that the risk upon the *goods* is to commence from their on goods ; being loaded on board the ship wherever that may be ; to continue upon them during the whole time they remain on board, and not to terminate until they have been discharged from the ship, and safely landed at the port of delivery. The risk upon the *ship* is to commence at the port from on ship. which she sails on the voyage insured, wherever that may be, to continue during her stay there, and not to terminate until after she has moored at anchor for twenty-four hours in good safety at the port named as the terminus of the risk.

The effect of this clause, however, depends of course upon the mode in which the blanks are filled up.² In the form in which we have filled it up the policy is a voyage policy

¹ The French effect the same object by inserting the words "ou autre pour lui : " see 1 Emerigon, c. vii.

ss. 1, 184-187.

² See Robertson v. French, 4 East, 130.

in the most usual terms. But the multifarious exigencies of commerce in a country like our own, which lead our merchants and shipowners to engage in enterprises almost infinitely varied, require the same diversity in describing as is displayed in the undertakings themselves; and policies are accordingly filled up in every variety of form, as we shall have occasion to see more at length when we come to consider the construction put from time to time by our Courts upon the loosely drawn and imperfectly expressed clauses by which our merchants have endeavoured to adapt the old policy to the diversified wants of commerce in modern times.

By statute, "Every policy shall specify the particular risk or adventure, and in case the same be omitted in any policy such policy shall be null and void to all intents and purposes."¹

Liberty to
touch or stay.

(8.) We have already said that the course of the ship's navigation is never in terms expressed in any policy. It is an implied condition of every policy, as we shall see more at large hereafter, that the ship in sailing between the termini of the voyage insured, shall pursue that course or track which long usage has established to be the safest and most direct mode of navigation, without deviating from it to touch at any ports or places whatsoever which lie between the extreme points of the voyage, unless express liberty for that purpose be inserted in the policy.

As very few voyages, however, occur in which it is not desirable that the ship should have the power of touching at intermediate ports, the common printed form of policy invariably contains this clause:—"And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever [] without prejudice to this insurance." The blank which is left, is for the purpose of specifying the particular ports and

¹ 30 Vict. c. 23, s. 7.

said twenty bales valued at that sum] or [at one thousand pounds, being on the interest which I. S. has as owner in one fourth share of the said ship, the said one fourth share being valued at that sum],” or the words “valued at” are frequently struck out, and a description of the subject of insurance then inserted without any valuation; as, *e. g.*, the said ship and goods, &c., for so much as concerns the assured and assurers in this policy are “freight,” or “profits,” or “money lent on bottomry.”

In this case it is obvious that the words “the said ship and goods,” &c., are to be read as though they meant “the subject insured by this policy, as far as concerns the assured and underwriters, is taken to be ‘freight,’ ‘profits,’ ‘bottomry,’” &c.

Sum insured. The words “valued at” are frequently struck out, and the sum insured is then inserted thus, “1000*l.* on ship,” or “on goods,” &c.; and if it is intended that it should be a valued policy, then it proceeds—

“£1000 on ship valued at . . .	£2,000
£2000 on goods valued at . . .	11,000”

By statute every policy shall specify the sum or sums insured, and in case the same shall be omitted in any policy, such policy shall be null and void to all intents and purposes.¹

Perils insured
against.

(10.) The next clause in the policy contains an enumeration of the perils against which the underwriters undertake to insure the property on which the policy is effected; or, in the language of the clause, which they “are contented to bear, and do take upon them” in the voyage insured.

As the underwriter is, on plain principles, considered not to be liable to indemnify the assured against loss arising from any perils not specified in the policy or embraced in the general clause, great care has been taken to make this form of words as comprehensive as possible; and the clause

¹ 30 Vict. c. 23, s. 7.

in its present state may fairly be regarded as affording a protection against almost every casualty which can possibly happen in the course of any voyage, and for which it is meant that the underwriter shall be answerable. The effect of it is frequently modified by express warranties inserted at the foot of the policy, *e. g.*, "warranted free from capture or any attempts thereat, or the consequences thereof."

(11, 12.) "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance: to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured." Sue and labour clause.

The effect of this clause, when stated generally, seems to be to provide by all reasonable means for the safety of the subject of insurance whensoever it is in danger of loss or damage by the perils insured against. Viewed more particularly, it enables the assured by his agents, servants, &c. to interfere for the prevention of imminent damage or loss without the dread of drawing thereby upon his own shoulders the misfortune that may result; it authorizes him to labour and to spend at the costs and charges of the insurers in order to avert a loss that would fall upon the insurers, or to mitigate its consequences; so that whilst he is entitled to recover all moneys properly expended by him in preventing such a loss or its consequences, he is not prejudiced by this interposition on his part from recovering for the loss itself, or from insisting on his abandonment of the subject of insurance, although notice thereof may have preceded his interference.¹ But as this clause is at present

¹ See the elaborate discussion of this clause in the very learned judgment of Willes, J., in *Kidston v. The Empire Insurance Co.*, L. R., 1

C. P. 535; in error, L. R., 2 C. P. 357. See post, Part III., Chap. II., Appendix.

worded, it does not entitle the assured to recover moneys expended in averting perils not insured against, when these threaten or assail the subject of insurance, or perils that are insured against if they do not threaten loss or misfortune to the subject insured.¹

Contract to insure;—and receipt clause.

(14, 15.) “And so we the insurers are contented and do promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises: confessing ourselves paid the consideration due unto us for this assurance by the assured,” &c.

The policy, it will be observed, contains only a promise by the underwriters, without anything in the nature of a counterpromise on the part of the assured; the reason of this is, that the premium, or, as it is described in this clause of the policy, “the consideration due unto them for the assurance,” is always supposed to have been paid to the underwriters at the time the policy is subscribed by them, and is accordingly acknowledged to have been so paid on the face of the instrument. In point of fact, the premium is scarcely ever, in the actual course of London business, paid till long after the policy is effected; the amount being passed in account between the insurance broker and the underwriter, between whom a running account is kept of premiums and losses.²

Although this is the actual course of practice, yet the acknowledgment of the receipt of premium in the policy is so far binding on the underwriter as to prevent him seeking to recover the premium from the assured himself; ³ unless there be fraud on the part of the broker ⁴ or of the assured.⁵

¹ Great Indian Peninsular Ry. Co. v. Saunders, 30 L. J. (Q. B.) 218; 31 id. 206; 1 B. & S. 41; 2 id. 266; Booth v. Gair, 33 L. J. (C. P.) 99; Meyer v. Ralli, 1 C. P. Div. 358.

² See ante, pp. 193, 195.

³ De Gaminde v. Pigou, 4 Taunt. 246; Dalzell v. Mair, 1 Camp. 532.

⁴ See Mayor v. Simeon, 3 Taunt. 497 n.

⁵ Foy v. Bell, 3 Taunt. 493.

(16.) The premium is the consideration to the insurer for the contract which he makes with the assured by the policy. Rate of premium. It is therefore necessarily expressed in the instrument, where it commonly appears in the form of a percentage "at and after the rate of" so much per cent. This consideration used to be required by statute to be expressed in the policy; such a statement is no less imperative now that it is left to the effect of the common law.

(18.) The Memorandum clause is introduced into all policies for the purpose of exempting the underwriters from liability for trivial losses. In the statutory form which is used by all private underwriters in this country, it is expressed in the following uncouth form of words:—

N.B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average unless general, or the ship be stranded [A].

Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5 pounds per cent. [B].

And all other goods, also the ship and freight, are warranted free from average under 3 pounds per cent. unless general, or the ship be stranded [C].

In order to make this form of words at all intelligible, it must be carefully borne in mind that the word "*average*," as employed in this clause, means damage or partial loss of the subject of insurance by the perils insured against,¹ and that the expression "*warranted free of average*," means, "so insured as to exclude all liability for such damage or partial loss." Hence the whole meaning of the clause is as follows:—

On certain articles of a peculiarly perishable nature enumerated in paragraph [A], the underwriter shall be answerable for a total loss only.²

On certain other articles of a less perishable nature, but

¹ See *Kidston v. The Empire Ins. Co.*, L. R., 1 C. P. 535; *Oppenheim v. Fry*, 3 B. & S. 873; 5 id. 348.

² Per *Willes, J.*, in *Kidston v. Empire Ins. Co.*, L. R., 1 C. P. 544.

still very liable to be destroyed by the perils insured against, enumerated in paragraph [B], he shall only be answerable when the amount of damage exceeds 5 per cent. of their value.

On ship, freight, and all other goods, he shall only be liable when the amount of damage exceeds 3 per cent.

But in all the three cases alike, the clause provides that the underwriter will be liable for any amount of damage or partial loss, however small, in case the ship be stranded; and it also provides, that he shall in every case be liable for every loss, however small, which is of the nature of general average.

Subscription
of the policy.

(19.) The only parties who sign their names at the foot of the policies, in other words, underwrite them, are the insurers, who are hence called the underwriters or subscribers.

In policies of insurance, effected with private insurers, each underwrites the policy with his name, the sum he intends to insure, which is generally written in words at length, and the date. But since the repeal (in 1825) of the 6 Geo. 1, c. 18 (which prohibited any partnership other than the two chartered companies from underwriting sea policies), a subscription in the name of the partnership firm has been held sufficient.¹

By statute, "Every policy shall specify the names of the underwriters and the sum or sums insured; and in case any of these particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."²

Policy must
specify the
sum insured.

In addition to this specification of the sums underwritten, a sum large enough to cover the aggregate amount insured is usually in practice expressed in figures on the margin of the policy, either just under, or just over the stamp.

Mutual Club
Policy.

In a policy in the common form, by an insurance club, where the aggregate sum insured appeared on the face of the

¹ Reid v. Allan, 4 Exch. 326; Dowdall v. Allan, 19 L. J. (Q. B.) 41, S. P.

It is a fundamental rule of Lloyd's,

that no member shall in the City of London underwrite in the name of a partnership. See ante, p. 150, note.

² 30 Vict. c. 23, s. 7.

policy, but no particular sums were written opposite to the names of the members subscribed to the policy, Gibbs, C. J., held that the policy was not void on this ground.¹ That however, was a decision in bygone times, when the 30 Vict. c. 23, had not come into existence. Since this Act came into operation, it has been held that a club policy, signed "A. & B. per procuracion of the several members of the A. A. Association for insuring each other's ships, every member bearing his equal proportion according to the sums mutually insured therein,"—did not comply with the Act, and therefore was invalid.²

Each underwriter is, generally speaking, only liable, in case of total loss, to pay the assured up to the extent of the sum he has thus written against his own name, *i.e.*, up to the amount of his subscription; or, in case of an average or partial loss, some proportion or aliquot part of that sum.³

Each subscription makes a distinct contract.

Each subscription makes a distinct contract; the contract being, that the underwriter is bound by the terms of the policy to the extent of his subscription, but no further. Hence it is that the date is not inserted in the body of the policy, but is affixed by each underwriter to that which forms the real contract between himself and the assured, *viz*, the subscription.

The practical rule in this country is, that every underwriter, as he successively subscribes the policy, sets down accurately the day, month, and year on which he does so.⁴ The subscriptions are inserted at the foot of the policy, and generally in the blank space which is left in our common policies under the memorandum.

Date and sum.

¹ Dowell *v.* Moon, 4 Camp. 166.

² *In re* The Arthur Average Ass., L. R., 10 Ch. App. 542.

³ But if there be a partnership, the fact of there being separate subscriptions by the partners individually does not bar the assured from resorting to the partnership assets: Brett *v.* Beckwith, 26 L. J. (Ch.) 130,

coram M. R.

⁴ The Co. de Com. art. 322, requires the policy to be dated on the day and hour when executed, distinguishing whether before or after noon. The date in France is conclusive, and so it would seem to be here; but see as to this, Duer, vol. i. p. 90.

Supposing the sum which the party effecting the policy wishes to insure be 1000*l.*, of which A. B. is willing to take on himself 500*l.*, C. D. 300*l.*, and E. F. 200*l.*, and that they all subscribed for those amounts, as very generally happens, on the same day; then the policy would be thus subscribed and dated:

{	£500	A. B. [name at length]	Five hundred pounds.
			1st of January, A.D. 1886.
	£300	C. D. [name at length]	Three hundred pounds.
			1st of January, A.D. 1886.
	£200	E. F. [name at length]	Two hundred pounds.
			1st of January, A.D. 1886.

Stamp Office
date.

The date we have here been considering is the date of the execution of the policy, but besides this on every stamped policy the day, month, and year, in which the form of policy is delivered out to the party applying for it must, under penalty, be truly inserted by the proper officer, and is generally affixed to the upper part of the left-hand margin of the form of policy, immediately under the stamp.¹

Stamp.

Every policy must be duly stamped before it is filled up and subscribed, with the amount of duty required by statute for the value of the property it is intended to insure; if not stamped in the first instance, it cannot, with two exceptions, legally be stamped afterwards; and a failure to comply with the provision of the Stamp Acts in this respect, not only renders the policy void, but entails a considerable penalty upon all those concerned in so effecting or subscribing it.² But we reserve the effect of the Stamp Laws for further consideration separately.

Recapitulation.

We have seen that no contract or agreement for sea insurance, unless it be to cover the shipowner's liabilities to

¹ 30 Vict. c. 23, s. 5.

² 30 Vict. c. 23, ss. 7, 9, 11, 12, 13, 14, 15, 16; 33 & 34 Vict. c. 97, s. 117; 39 & 40 Vict. c. 6; and 44 & 45

Vict. c. 12, s. 44. A policy unstamped, or insufficiently stamped, is admissible in evidence on paying duty and penalty.

others within the 25 & 26 Vict. c. 63, s. 54, is valid if it be not expressed in a policy. The following appear to be the substantial requisites of every policy of insurance:—1, the name of some party either really or nominally insured;—2, a description of the voyage or risk insured;—3, of the subject insured;—4, of the perils insured against;—5, the name of the ship and master (except where the insurance is on goods by *ship or ships*);—6, the premium or consideration for the contract;—7, the sums insured;—8, the subscription of the underwriter. It is moreover requisite, that every policy should be,—9, dated;—and 10, stamped before execution.¹

In addition to these, which are the common printed clauses in the ordinary form of policy, it has become very usual to insert what is known as the *running down clause*. It varies in form; we give the following copy of one in actual use:—

Running-down clause.

“And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of eight pounds per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, *calculated at the rate of eight pounds per ton*, or if the value hereby declared amounts to a larger sum, then to such declared value, and in cases where the liability of the ship has been

¹ The statutory requisites are, 1. The insertion of the name of some party really or nominally assured under 28 Geo. 3, c. 56; 2. The stamp; 3. The risk or adventure; 4. The names of the underwriters; 5. The

sums insured; 6.—At common law, —the premium, being the consideration for the contract. *The omission of any of these renders the policy null and void to all intents and purposes.*

contested with our consent in writing, we will also pay a like proportion of three fourth parts of the costs thereby incurred, or paid, provided also, that this clause shall in no case extend to any sum which the insured may become liable to pay or shall pay in respect of loss of life or personal injury to individuals for any cause whatsoever.”¹

We do not repeat here what has been already said in reference to other statutory occasions of loss to the ship-owner against which it is lawful for him to protect himself by insurance.²

Express warranties.

The clauses hitherto considered are for the most part those to be found in the statutory form of policy. With the varying exigencies of commerce, however, and the fluctuating character of the political relations between mercantile states, occasions frequently arise which render additional precautions desirable on the part of the assured and the insurer. These are inserted in writing on the face of the policy, and, in English law, are called Express Warranties.

The effect of these warranties will be fully discussed hereafter. In point of form they are generally thus:—
 “Warranted to sail on or before the 1st day of June, 1886.”
 “Warranted well, this 1st day of June, 1886.” “Warranted to depart with convoy.” “Warranted neutral ship and neutral property.” “Warranted a Dane,” &c.; or the word “warranted” is altogether omitted, and the words “to sail,” or “to sail with convoy,” &c., alone inserted. All that is essential with respect to the insertion of such clauses of warranty is, that they should appear somewhere or other on the face of the policy; it need not be in the body of it; it may be either at the foot,³ or on the margin of the policy,⁴

¹ See for other forms and the effect thereof, *Xenos v. Fox*, L. R., 3 C. P. 630; 4 id. 665; *Taylor v. Dewar*, 5 B. & S. 58; 33 L. J. (Q. B.) 141; *Thompson v. Reynolds*, 7 E. & B.

172; 26 L. J. (Q. B.) 93.

² Ante, Chap. II. p. 36.

³ *Blackhurst v. Cockell*, 3 T. R. 363.

⁴ *Bean v. Stupart*, 1 Dougl. 11.

and that either in the usual way or transversely;¹ for wherever or however written, so as it be on the face of the policy, it will be a good warranty, as whatever is contained in the policy at the time of signing is a part of the contract, and is adopted by the signature.² It would seem, however, that unless initialed by the underwriters, or referred to in the body of the instrument (in either of which cases it would no doubt be operative),³ a memorandum indorsed on the back of the policy would not be permitted to have any effect in varying or modifying its terms.⁴

Besides the various express clauses and stipulations, both ordinary and extraordinary, already considered, every policy of insurance impliedly contains within itself certain terms and conditions, which, though not on the face of the instrument, are of the same binding authority as if they were, and combine with the express clauses to make up the whole of the contract between the assured and the underwriter.

Implied warranties in the policy.

They are, in fact, the terms upon which the parties mutually understand their contract to be based; and are regarded as so much a matter of course, that it would be a needless ceremony to express them in form. If either of the parties fail to comply with any one of these conditions, he entirely precludes himself from taking any advantage of his contract.

1. Thus it is an implied condition in every policy that the assured, at the time of procuring the policy, shall fairly and truly disclose to the underwriter every fact material to the risk which is exclusively within his own knowledge, and which is not embraced by some agreement in the

Representation and concealment.

¹ *Kenyon v. Berthon*, 1 Dougl. 12, n.

² *Cockran v. Retberg*, 2 Esp. 121; *De Hahn v. Hartley*, 1 T. R. 343.

³ See *Laird v. Robertson*, 4 Br. Parl. Cas. 488; *Ridsdale v. Shedden*, 4 Camp. 107; and especially *Reed v.*

Deere, 7 B. & Cr. 261.

⁴ 1 Duer, 76. See an analogous decision of the House of Lords, in respect of a passenger ticket by rail: *Henderson v. Stevenson*, L. R., 2 H. of Lds. (Sc.) 470.

policy. If this condition is not complied with, the policy is void.

Seaworthi-
ness.

2. Again, the assured is understood by the very act of procuring the insurance to warrant that the vessel is seaworthy, and in every way fit for the voyage or service on which it is or is to be employed; accordingly this warranty, though it is never expressed, is uniformly implied as a part of the contract in voyage policies.

Track of the
ship.

3. The actual course of the ship between the termini of the voyage is, as we have seen, never inserted in any policy; because every underwriter is presumed to be acquainted with the usual mode of conducting the voyage on which he has assured the risk; but, although never inserted, the usual course of the voyage is supposed to be incorporated in every policy, and as much forms part of its legal effect, as though it were set out in terms on the face of the instrument.¹

Deviation or
delay.

4. It is always an implied condition of every policy, that the ship in proceeding from one terminus to the other shall pursue the usual course of the voyage without any delay or deviation: this implied condition is generally termed a condition not to deviate; and any failure to comply with it, exempts the underwriter from liability from the moment of deviation.²

All mercantile
usages are
incorporated.

5. Not only the course of the voyage insured, but all generally established usages of trade and navigation relevant and applicable to the subject of their contract, are always supposed to be known by the parties contracting for a mercantile indemnity; and therefore, though never expressly inserted in any policy, are as binding on the parties as though they were.

General
effect.

It is never to be forgotten, then, that the whole contract between assured and underwriter is only partially expressed in the policy; and that the real contract between them is,

¹ Noble v. Kennoway, 2 Dougl.
510; Pelly v. Royal Exch. Ass. Co.,

1 Burr. 341.

² 1 Marshall, Ins. 177.

that, supposing the underwriter to have been informed beforehand of the real nature of the risk, supposing also the ship to have been seaworthy when the risk commenced, and never afterwards to have deviated from the usual course of the voyage insured, and the assured not to have precluded himself from recovery on the ground of illegality of the risk, then the underwriters engage to indemnify him, according to the terms of the policy as explained by usage, for any loss he may sustain as a direct and immediate consequence of the enumerated perils.

The stamping of policies of sea insurance in this country is regulated mainly by the 30 Vict. c. 23. The Stamp Acts.

By the fourth section of that Act it is declared that—

“Sea insurance” means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever, on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to any ship or vessel. Interpretation of terms.

By sect. 8 of the 47 & 48 Vict. c. 62, the said term of “sea insurance” shall include any insurance of goods, wares, or merchandise, or property of any description whatever, for any transit which includes not only a sea risk, but also any land risk from the commencement of such transit to the place of shipment, or from the place of discharge of the ship to the ultimate destination covered by the insurance, or in warehouse while waiting or being forwarded for shipment, or after discharge and while waiting to be forwarded or being forwarded to the ultimate destination covered by the insurance, or any other land risk incidental to the transit insured.

“Policy,” by sect. 4 of the 30 Vict. c. 23, means any instrument whereby a contract or agreement for any sea insurance is made or entered into.

Issue of
stamped
policies.

The fifth section provides for the printing and sale of blank policies in the form set forth in the Schedule, duly stamped, and for the stamping of blank forms, brought in for that purpose, requiring the proper officer under penalty of 100*l.* to mark the said forms with the date of issue or delivery before they are issued or delivered.

Contract null
and void if
not expressed
in a policy.

The seventh section declares any contract for sea insurance invalid if not expressed in a policy, except it be insurances referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862,—and also every policy null and void to all intents and purposes which omits to specify any of the following particulars:—the risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured.

Limitation
of period of
insurance.

By the eighth section, any policy made for any time exceeding twelve months is null and void.

Stamping of
policies.

By the ninth section, any policy not duly stamped is not good or available in law or equity;¹ and any policy which after being executed is unstamped, or not sufficiently stamped, may be stamped on payment of the duty and a penalty.² A policy of mutual insurance already stamped and underwritten, if it be not underwritten to an amount beyond what the stamps will warrant, may be stamped with additional stamps, without penalty. And a policy made abroad and chargeable with stamp duty within the 117th section of 33 & 34 Vict. c. 97, may be stamped within fourteen days after it has been first received in the United Kingdom on payment of the duty only.³

Alterations
in policy
underwritten.

By the tenth section (30 Vict. c. 23), nothing in the Act is to prohibit any alteration, which may lawfully be made, in

¹ 30 Vict. c. 23, s. 9.

² 39 & 40 Vict. c. 6, s. 2, placing marine policy among the instruments that may be stamped after execution within sect. 16 of 33 & 34 Vict. c. 97 (General Stamp Act), but requiring a penalty of 100*l.* in each case.

By the 44 & 45 Vict. c. 12, s. 44, the effect of sect. 16 of 33 & 34 Vict. c. 97, is extended to proceedings before an arbitrator or referee in respect of marine policies unstamped or insufficiently stamped.

³ As amended by 44 & 45 Vict. c. 12, s. 44.

the terms and conditions of any policy after being underwritten—subject, however, to the following provisoes:—1, that such alteration be made before notice of the determination of the risk originally insured;—2, that it do not prolong the time beyond six months in policies for less than six months, or beyond twelve months in policies for more than six months;—3, that the articles insured remain the property of the same person or persons;—and, 4, that no additional or further sum be insured by reason or means of such alteration.

By the eleventh section, mixed policies for time and also for a voyage, or which cover any period beyond thirty days after being anchored on arrival, must be stamped both as time policies and as voyage policies.¹

Mixed policies stamped double.

The twelfth section declares any contract for insurance of goods or other property while on board by any carrier or other person, in consideration of additional freight or the like, to be a contract for sea insurance, thereby bringing it within the operation and effect of the other sections of the Act.

Carriers as insurers must contract by policy.

Sections 13, 14, and 15 impose penalties of 100*l.* on persons insuring or effecting as assured or agent any insurance except by duly stamped policies, and on persons making or issuing any copy of a policy which at the time is not in existence as a duly stamped policy.

Penalties.

By section 16, any right to recover brokerage or agency, or any money expended for premiums, is taken away in all cases within the foregoing three sections, and any money actually paid on any such account by the principal to his broker or agent negotiating, transacting or making any insurance contrary to the Act, may be recovered back as money received for the principal's use.

Section 17 provides for allowance for spoiled stamps.

Spoiled stamps.

By the 33 & 34 Vict. c. 97, s. 117 (2), a policy of sea insurance made or executed out of, but being in any manner

Policies made abroad.

¹ Amended by 47 & 48 Vict. c. 62, s. 8, substituting "thirty days" for "twenty-four hours."

enforceable within, the United Kingdom, is to be charged with duty under the 30 & 31 Vict. c. 23, and may be stamped at any time within fourteen days after it has been first received in the United Kingdom on payment of the duty only.¹

Scale of
Duties.

The following is the Scale of Duties on Sea Insurance²:—

For every policy of sea insurance for or upon any voyage— s. d.

in respect of every full sum of 100*l.*, and in

respect of any fractional part of 100*l.*

thereby insured 0 3

For every policy of sea insurance for time—

in respect of every full sum of 100*l.*, and in

respect of any fractional part of 100*l.*

thereby insured—

where the insurance shall be made for any

time not exceeding six months 0 3

where the insurance shall be made for any

time exceeding six months and not ex-

ceeding twelve months 0 6

Repealed.

[If, however, the separate and distinct interests of two or more persons be insured by one policy, the respective duties, as the case may require, shall be charged thereon in respect of each and every fractional part of 100*l.*, as well as of every full sum of 100*l.*, which shall be thereby insured upon any separate or distinct interest.³]

Policy may be stamped for the purpose of evidence.

A very important provision introduced for the first time in relation to marine policies by the Act of 1876,⁴ permits a

¹ Amended by 44 & 45 Vict. c. 12, s. 44, substituting "fourteen days" for "two months."

² 30 & 31 Vict. c. 23, sched. B.

³ Ibid. This provision as to separate and distinct interests, after being

amended by the 39 & 40 Vict. c. 6, s. 1, was finally repealed by the 47 & 48 Vict. c. 62, s. 8.

⁴ 39 Vict. c. 6, s. 2, making sea policies instruments within the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 16.

policy of marine insurance, for the purpose of being given in evidence, to be stamped after the execution thereof on payment of the duty, and a penalty of 100%.

The broker, when requested to effect an insurance, prepares a brief memorandum of the leading particulars of the proposed risk, such as convey at a glance to those who are skilled in the business a sufficient notion of the intended policy, to enable them to say whether and at what premium they will underwrite it. This memorandum, called *the Slip*, is presented, if at Lloyd's, successively to the underwriters there, who, if they think well of the risk and the premium at which it is either offered or has already in part been taken, initial the slip each for the sum he thinks proper to underwrite, and so on, until the whole amount is subscribed. If the application be to the companies, a fresh slip is presented to each, and the secretary or underwriter, in case the risk be taken, initials it for so much. Slips.

"The slip," says Blackburn, J.,¹ "is in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.

"The Legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose.² But all those enactments are repealed by the

And by the 44 & 45 Vict. c. 12, s. 44, "any Court of Civil Judicature," includes proceedings before an arbitrator or referee for the purposes of sect. 16 of the above Stamp Act.

¹ *Ionides v. Pacific Fire and Marine*

Ins. Co., L. R., 6 Q. B. 674, 684, 685.

² So much so that Lord Ellenborough, C. J., refused to look at it as a means of showing the order in which the underwriters had taken the risk; *Marsden v. Reid*, 3 East, 571.

30 Vict. c. 23; and the law is now governed by the 7th and 9th sections of that Act. By sect. 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by sect. 9 *no policy* shall be pleaded or given in evidence in any Court unless duly stamped. As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material."

Consequences
of this altera-
tion.

Hence it has been held that after the slip was initialed, *i.e.*, the contract between the parties having been made, though not evidenced by a duly stamped policy, any fresh fact coming afterwards to the knowledge of the assured need not be communicated to the underwriter, however material it may be;¹ and that this effect in law is not varied by the mere fact that the slip was initialed for the agent of the assured, subject to confirmation by his principal.² In the case of a company in Liverpool whose agent in London initialed a slip as usual, and received from the brokers copy of such slip, which he forwarded to his principals, the company, but no policy was returned nor any notice from the company that they refused the risk, Blackburn, J., assuming such second or copy slip to be a second agreement, held the company to be in the position both of brokers and insurers, and liable by reason of the want of such notice for the loss which had occurred in the meantime. But in this opinion the learned Judge was not sustained, the other members of the Court and the Court of Appeal being of opinion that the two slips in the case were parts of one contract, and that in the absence of a policy the company were not liable.³

¹ *Cory v. Paton*, L. R., 7 Q. B. 304; on appeal, 9 Q. B. 577; *Lishman v. Northern Maritime Ins. Co.*, L. R., 8 C. P. 216; 10 C. P. 179; *Ionides v. Pacific Fire and Marine Ins. Co.*, L. R., 6 Q. B. 674; L. R.,

7 Q. B. 517.

² *Cory v. Paton*, L. R., 9 Q. B. 577.

³ *Fisher v. Liverpool Maritime Ins. Co.*, L. R., 8 Q. B. 469; L. R., 9 Q. B. 418.

In the United States, where the restrictions of the revenue law do not interfere, and the great bulk of sea insurance business is carried on by companies, it is very generally the case that a memorandum of the contract, or an agreement to insure, is made out and subscribed before executing the policy. In such case “the usual practice,” says Mr. Phillips, is, “to enter the agreement on the books of the insurance company, subscribed by some officer authorized to bind the company. Such a memorandum is binding on the company to make out a policy if the premium is paid in due time.”¹

In the United States.

Many questions have arisen, and very elaborate decisions taken place in the United States, as to what will amount to the consummation of an agreement to insure between parties in different places, communicating by letter or message.²

The policy is the only legal evidence of the terms of the contract of marine insurance, and, as such, will be avoided, according to one of the best known rules of the common law,³ by any material alteration introduced into it, without the consent of all parties, after it has once been underwritten.

Corrections and alterations in the policy.

At common law.

Until that time, as it is merely *in fieri*, and neither a contract nor evidence of one, any alteration whatever may be made with the consent only of the parties immediately concerned. A policy as originally drawn was upon plaintiff’s share of goods valued at 500*l.*, but some days after it had been underwritten by the defendant, and before the whole sum was underwritten, it was found that plaintiff’s share was larger than was supposed, and therefore the

Before subscription.

¹ 1 Phillips, no. 13.

² Ibid. nos. 13 et seq., where Mr. Phillips details at length the cases on this subject; see also 1 Duer, 66, 109 et seq.

³ *Master v. Miller*, 4 T. Rep. 320;

2 H. Bl. 230; 1 Smith’s L. C.; Pigot’s Case, 11 Rep. 26 a; *Davidson v. Cooper*, 11 M. & W. 795; (in error) 13 M. & W. 343; *Suffell v. Bank of England*, 9 Q. B. D. 555 (C. A.).

following words, "on his share of the goods say one-fifth, valued at 1000*l.*," were added in the margin, with defendant's consent and initials; Lord Ellenborough was of opinion that the alteration, though material, did not vitiate the policy, as it was all *in fieri*, and constituted but one agreement.¹

After sub-
scription.

To correct a
mistake.

If it clearly appear that there has been a mistake committed to the prejudice of the defendant in drawing up the policy, and that the terms employed in it do not express the true intention and understanding both of the assured and underwriters at the time they entered into the contract, this is a good ground of defence to an action on the instrument,² or in case complete justice cannot in that way be done, then it may be a sufficient reason for reforming the instrument.³

Accordingly, where the risk was described in the early part of a policy as a voyage *at and from Fort St. George*, and the subsequent words were "beginning the adventure from and immediately following the ship's departure from Fort St. George;" Lord Hardwicke, on proof that the policy had been filled up from a label, signed by the agent of the assured and two of the directors of the company, describing the risk to be "at and from" Fort St. George; and the underwriters not disputing that the label expressed the intention of both parties, held, that it must be considered a policy "at and from."⁴

Upon a similar application, where the evidence appeared to be contradictory, Lord Hardwicke dismissed the bill, at the same time stating that whilst the Court had jurisdiction to relieve in respect of a plain mistake in contracts that had

¹ *Robinson v. Tobin*, 1 Stark. 336.

² See *Wake v. Harrop*, 30 L. J. (Ex.) 273; 6 H. & N. 768; (in error) 31 L. J. (Ex.) 451.

³ But in the words of Story, J., a court of equity will "be extremely cautious in the exercise of such an authority, and will withhold its aid where the mistake is not made out

by the clearest evidence, according to the understanding of both parties, and upon testimony entirely exact and satisfactory;" *Andrews v. Essex Fire and Mar. Ins. Co.*, 3 Mason's Rep. 6; *In re Bird's Trusts*, 3 Ch. Div. 214.

⁴ *Motteux v. London Ass. Co.*, 1 Atkyns, 545.

been reduced into writing in a form contrary to the intention of the parties, it would only exert such power upon being satisfied by the strongest possible evidence that a mistake had really been made.¹

The contract of the underwriters is complete in fact and in form when they have signed the policy. A declaration of interest to be afterwards made stands on a different footing. "It is the mere exercise of a power conferred on the assured. It is generally put upon the policy for convenience; but this is not necessary; nor is there any necessity for its being in writing." If, therefore, a broker has committed a blunder in making this declaration, as where he has declared goods by the wrong ship, this blunder may be rectified without the assent of the underwriters.²

Mistake in
declaring
interest.

The parties themselves may, by consent, introduce any alterations into the policy, even after it is underwritten, whether by an erasure, and interlineation,³ or an addition in a blank space, which may be required by their mutual interests, and sanctioned by their mutual agreement (subject, however, as we shall see, to the provisions of the Stamp Acts); and such alterations, if properly signed, and not infringing the provisions of the Stamp Acts, form as valid a contract between the parties as the original terms of the policy.

Corrections
by consent.

Policies are required by law to be in writing, and therefore alterations intended to make policies express the meaning of the parties must also be in writing, either in a separate instrument, or on the face or back of the policy itself; and in either case subscribed by, or as is most usual in practice, signed by the initials of, the underwriters, who are intended to be bound by them.⁴ The only ground upon which a

Must be in
writing.

¹ *Henkle v. Royal Exch. Ass. Co.*,
1 Ves. Sen. 317.

² *Robinson v. Touray*, 3 Camp.
158.

³ Striking a pen across words, and
writing others over them, so as to

make them illegible, is a cancelling
of the words; *Fairlie v. Christie*, 7
Taunt. 416.

⁴ *Kaimes v. Knightly, Skinner*, 54;
Robinson v. Tobin, 1 Stark. 336.
See *Reed v. Deere*, 7 B. & C. 261.

written alteration of this kind can be binding upon any of the parties to the original policy, is his assent signified thereto by his signature; in the absence of this, dissentients are not bound by the policy as altered.¹

General rule
at common
law.

As to alterations, the general rule is, that any material alteration of the policy, by the assured, avoids the policy, except as to those underwriters who have consented to it in writing, by signing their initials to the memorandum in which the alteration is specified, or to the interlineation, erasure, or addition by which it is effected.²

What are
material
alterations.

The question, therefore, has generally been, what constitutes a material alteration? To use the language of Judge Duer, does it change the sense, or affect in any degree the substance of the contract?

Destination.

Where a ship was insured from Virginia to Rotterdam, with leave to call at a port in England, and the assured, after the policy was underwritten, by consent of some of the underwriters (indorsed on the policy), altered her destination from Rotterdam to Hull: this was held to avoid the policy, as to all the underwriters, except those who had signed the indorsement.³

Subject of
insurance.

So the insertion of a specific subject of insurance in a policy which had been executed in blank;⁴ the alteration of a specified day in the warranty as to time of sailing;⁵ and the alteration of a policy which had been "from Colmar to Portsmouth" into a policy "from Colmar to Portsmouth, or Weymouth;" were severally held to be policies not binding on those underwriters who had not subscribed the alteration, and this, too, in the latter case, notwithstanding the

Time of
sailing.

Another
*terminus ad
quem*.

¹ Forshaw v. Chabert, 3 Br. & B. 158; 6 Moore, 369; see also 1 Duer, 78-81, notes 142 et seq.

² Laird v. Robinson, 4 Brown's Parl. Cases, 488; Langhorn v. Cologan, 4 Taunt. 330; Fairlie v. Christie, 7 Taunt. 416; Campbell v. Christie, 2 Stark. 64; Saunderson v. Symonds, 1 Br. & B. 426; Forshaw v. Chabert,

3 Br. & B. 158; 6 Moore, 369.

³ Laird v. Robertson, 4 Brown's Parl. Cases, 488.

⁴ Langhorn v. Cologan, 4 Taunt. 330.

⁵ Fairlie v. Christie, 7 Taunt. 416; 1 B. Moore, 114; S. C. at N. P., Holt, 331.

underwriter when first informed of it had said he would not take advantage of it.¹

So, where a ship was insured from "Cuba to Liverpool, with liberty in that voyage to proceed to and touch and stay at and discharge and take in at any ports or places whatsoever, without prejudice," and after the subscription of the policy a leave "to call off Jamaica" was inserted in the body of it; the Court held, that, as Jamaica was out of the direct course of the voyage insured, this was a material alteration which avoided the policy as to an underwriter who had not signed it; although his not doing so seemed to be the result of accident rather than in consequence of a refusal.²

Liberty to call.

On the other hand, where the alteration is *not* material, it will not vitiate the policy; but, in such case, if some of the underwriters have consented to the alteration, after the policy is executed, and others refuse, those who consent make the altered instrument their own; but those who do not, remain liable on their original contract.³

Immaterial alterations.

The following alterations have been considered *not* to be material:—A policy was originally filled up "on *The Three Sisters*, at and from Cadiz and Seville to Liverpool;" after the policy was underwritten the broker added the words *Tres Hermanas* (Spanish for *The Three Sisters*) and also the words "both or either" to the description of the voyage: Lord Ellenborough said that, "as the English name, *The Three Sisters*, did not amount to a warranty that the ship was an English ship, the policy was not avoided by merely inserting the equivalent Spanish name of *Tres Hermanas*." As to the words "both or either," his Lordship said, that "as the ship, as originally insured, had the option of going both to Seville and Cadiz or not, as it might suit the exigencies of the adventure, these words did not give any

Tres Hermanas, inserted after *The Three Sisters*.

¹ Campbell v. Christie, 2 Stark. 64.

³ Per Richardson, J., in Saunde-

² Forshaw v. Chabert, 3 Br. & B. 158.

son v. M'Callum, 4 J. B. Moore, 5.

additional liberty, and therefore did not affect the legal operation of the instrument."¹

Liberty "to trade."

A ship was insured "from Liverpool to her port or ports of discharge and loading in Africa, during her stay there, and back to Liverpool, with liberty to proceed and sail to and touch and stay at any ports or places wheresoever, to sell, barter, and exchange, and load, unload, or reload goods at any or all of the ports and places she may call at or proceed to." The broker, after the subscription of the policy, fearing that the words employed might not be sufficiently extensive to include a trading, added the words "and trade." He then presented it to the various underwriters for their consent to this alteration, which most of them signified by putting their initials to the underlined words: the defendant, however, refused to do so, alleging that he never underwrote trading policies to Africa. But the Court were clearly of opinion that, notwithstanding the defendant had expressly refused to underwrite a trading policy to Africa, the alteration was not material, because upon the true construction of the policy as it originally stood, there was already liberty to trade on the coast of Africa.²

There seems no doubt that a material alteration, unassented to, will avoid the policy wherever made on the face thereof, *i. e.*, in the margin as much as in the body of the instrument (in fact, in *Fairlie v. Christie*, cited above, the alteration was in the margin). With regard to memoranda on the back of the policy, and not signed by any of the underwriters, inasmuch as they would be inoperative, they would not be held to avoid the policy, even if embodying material alterations.³

¹ *Clapham v. Cologan*, 3 Camp. 382.

² *Saunderson v. Symonds*, 1 Br. & B. 426; 4 Moore, 42; *Saunderson v. M'Callum*, 4 Moore, 5, *S. P.* See the remarks of Duer, vol. i. 78-81, on the general principle involved in the

cases, and 142-146 for illustrations; including some American authorities; see also 1 Phillips, no. 109 et seq.

³ 1 Duer, 82. See *Henderson v. Stevenson*, L. R., 2 H. of Lds. (Sc.) 470.

So much for alterations considered in relation to the principles of the common law. We come now to discuss the effect of the stamp laws upon the same subject.

Alterations
under the
Stamp Acts.

The 30 Vict. c. 23, s. 10, in effect provides, that even where the underwriter has consented to the alteration in the policy, the altered policy shall be void, without a fresh stamp, unless the case as altered complies in all respects with the conditions specified in the section. The section is as follows: "That nothing in this Act shall extend or be construed to extend to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy after the same shall have been underwritten; provided that such alteration be made (1st), before notice of the determination of the risk originally insured; (2nd), and that it shall not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period allowed by this Act in the case of a policy made for a greater period than six months;¹ (3rd), and that the articles insured shall remain the property of the same person or persons; (4th), and that no additional or further sum shall be insured by reason of such alteration."

30 Vict. c. 23,
s. 10.

Alterations
not requiring
to be re-
stamped.

Provisoos—

i.

ii.

iii.

iv.

By this section (which it is said ought to have a liberal construction),² no alterations in policies are made legal, which would have been illegal at common law, without the assent of the underwriter; but even with the underwriter's assent, the policy will be void under the statute, if there is a violation of any of the conditions of the 10th section.

From the cases upon a previous enactment similarly worded, it appears that by the words "before notice of the determination of the risk originally insured,"—is meant that determination of the risk which is caused "by the loss, or

Meaning of
the section.

¹ Twelve months on a time policy.

² Per Lord Tenterden in *Brockelbank v. Sugrue*, 1 B. & Ad. 81, 88.

safe arrival of the thing insured, or by the final end and conclusion of the voyage."¹

To sail on a given day.

Hence, where a policy "on goods to be shipped on board ship or ships which should sail between the 1st of October, 1799, and the 1st of June, 1800," was altered by a memorandum extending the time of sailing to the 1st of August, 1800, after the original time for sailing had expired, but before the loss happened, Lord Ellenborough and the Court of King's Bench held, that this was an alteration made before notice of the determination of risk.²

A warranty that the ship should sail on a given day, was, with the consent of the underwriters, and for an increase of premium, cancelled, subject to a return of premium if the ship sailed with convoy, and was held to require no fresh stamp: "For," said Lord Ellenborough, "this alteration was made before notice of the determination of the risk originally insured"—"the thing insured remained the property of the same person"—"and no additional sum was insured by means of such alteration."³ So, the specified mark on the goods, as well as the warranty to sail on a given day, were both altered by agreement, and did not make any fresh stamp requisite.⁴

Change of terminus.

So, where a ship was insured "from Stockholm to Swinnemunde," and while she was lying at Wisburg for repairs, as it was doubtful whether the enemy might not be at Swinnemunde, the underwriters consented to alter the policy, by adding the words "Koenigsberg or Memel" after the word "Swinnemunde," the Court held, that the alteration was made while there was only an intention to determine the risk originally insured, and before its actual determination.⁵ If, indeed, the change of terminus were such as to involve the entire substitution of a new adventure for that originally insured, the case would be different.

¹ Per Lord Ellenborough in *Kensington v. Inglis*, 8 East, 273, 291.

² *Kensington v. Inglis*, 8 East, 273.

³ *Ridsdale v. Shedden*, 4 Camp. 107.

⁴ *Hubbard v. Jackson*, 4 Taunt. 169.

⁵ *Ramstrom v. Bell*, 5 M. & Sel. 267; see also *Brockelbank v. Sugrue*, 1 B. & Ad. 81.

Further, by this section, an alteration may be made in the "terms and conditions" of the policy, on condition "that the articles insured shall remain the property of the same person or persons." "These words, 'the articles insured shall remain the property,' &c., appear to us," says Lord Ellenborough, "properly to require and apply to one identical and continued subject matter of insurance, and not to be applicable to a case where the thing first insured is not only in fact, but in name and in kind (as a specific subject of insurance), essentially different from the thing first insured."¹

Changes of
terms and
conditions.

Hence, where a policy was effected "at and from London to the South Seas, during the ship's stay and fishing there, and at and from thence to Great Britain," "on ship and outfit;" and then, with the consent of the underwriters, after the subscription of the policy, but before notice of loss, was altered into a policy "on ship and goods;" it was held, that this alteration was in excess of the stamp on the policy, because the *outfit* originally insured was a totally different kind of thing, on a whaling voyage, from *goods* to which the altered policy was made to apply.²

It is to be observed that by the section of the statute as interpreted by this decision, it is not intended that the subject of insurance should, throughout the voyage, continue the same specific thing, but only of the same denomination. As, for instance, in bartering voyages, although the original goods insured are exchanged for other goods in the course of the voyage, yet, as all continue equally to come within the general denomination of "goods," the alteration is of no effect within the meaning of the statute.³

We have already seen, that an express warranty may be altered without being in excess of the stamp. It has also been decided that a memorandum, by which the underwriter consents to waive the implied warranty that the ship was

Waiving
implied
warranty.

¹ Per Lord Ellenborough in *Hill v. Patten*, 8 East, 373, 376.

² *Hill v. Patten*, 8 East, 373.

³ Per Lord Ellenborough, 8 East, 377. See also *Kensington v. Inglis*, 8 East, 273.

seaworthy at the time of sailing, is not such an alteration of the policy as to be beyond the stamp; for such consent prevents the inference which would otherwise arise, that the unseaworthiness was a determination of the risk.¹

Correction of
a mistake.

There is a wide difference, as regards the stamp, between cases in which the alteration is merely the correction of a mistake, and those in which it is, in fact, intended to make a new instrument. The one is an alteration of the contract for the mere purpose of making it express in terms what both parties intended it should express at the time of making it; the other is an alteration for the purpose of giving it a different meaning and extent from that which both parties intended it to bear at the moment of its execution. Alterations of the first class are not beyond the stamp, those of the second are.²

Hence, where the policy was on goods, by "ship or ships" to be thereafter declared, and the broker, by mistake, made declaration of a wrong ship, a memorandum rectifying this mistake in no way affected the stamp.³ So, in a case where the assured having no interest in the ship, but only in the cargo, the words "on ship," which had been inserted by pure mistake, were struck out, and the words "on goods as interest may appear," substituted in their room, it was held that this alteration was within the stamp.⁴

Original
rights de-
stroyed by
alteration.

Where no rights or liabilities can arise under the altered instrument by reason of the stamp laws, the rights and liabilities which existed under the original instrument are nevertheless destroyed by the alteration.

After the Court, in *Hill v. Patten*, had decided that the alteration of *outfit* into *goods* was one which could not be made without a fresh stamp, and therefore that the plaintiff could not recover on the policy as altered, the plaintiff

¹ *Weir v. Aberdeen*, 2 B. & Ald. 1 M. & Sel. 217.
320.

² *Cole v. Parkin*, 12 East, 471.

³ *Robinson v. Touray*, 3 Camp. 158;

⁴ *Sawtell v. Loudon*, 5 Taunt. 359;
1 Marshall, R. 99.

brought an action upon the policy in its original form; but the Court held he could not recover on that either.¹ Lord Ellenborough said, "The altered policy, though ineffectual as an instrument to sue on, was effectual to do away with the former agreement, which was thereby abandoned;"² and Le Blanc, J., asks "how the Court can enforce an agreement, after the parties themselves, upon the very face of the same instrument, have declared that it is not their agreement, and have actually written another and a different agreement in the place of it."³ It seems to make no difference whether the memorandum embodying the alteration is written on the back or the face of the policy,⁴ provided it be signed by the underwriter.

We have considered in detail the form in which the ordinary Lloyd's policy is executed by the individual underwriters.⁵ Partnerships may execute in the name and style of the firm. Companies according to their deed or articles of association issue their policies executed under seal or by signature, or both by seal and signature, occasionally countersigned by the secretary.⁶

The perfecting, forfeiture, and cancellation of the policy.

Mode of execution.

After being executed in the form which is binding on the insurer, and before being issued, while the policy is still in his possession, he may cancel his execution of it. If when executed in due form by the insurer he deliver the policy to his clerk to be kept till called for, the presumption upon such evidence, without more, is that by intention of the insurer it is a valid and binding instrument. Little room for questions of this nature is left by the practice at Lloyd's, where it is usual for the broker to carry round the policy for the subscription of those underwriters who have initialed

Delivery of policy.

¹ French v. Patten, 1 Camp. 72; 9 East, 351.

² 9 East, 355.

³ Ibid. 357.

⁴ Reed v. Deere, 7 B. & C. 261.

⁵ Ante, p. 250, and see rule of Lloyd's cited at p. 150, note 2, disallowing of any underwriting in the name and style of a partnership.

⁶ Ante, p. 156.

the slip. With companies the practice is different, for the execution usually takes place in the absence of the assured or his broker, and hence of necessity delivery is never immediate nor at any time formal. The presumption therefore is that when the instrument, completed and executed, passes into the hands of the company's servants to be kept till called for by the assured, it is already a valid policy.¹

The policy one instrument in legal conception.

A policy of insurance, though containing as many contracts as there are insurers underwriting it, appears, nevertheless, to be considered so much one instrument in legal effect as to be still—*in fieri*—in the process of being perfected, although executed by one or more of the insurers, so long as the whole amount of the insurance is not underwritten. Under such circumstances, an alteration, though material, being made with the consent of those who had underwritten, was held not to have vitiated the instrument, as it was still only in the process of formation.²

Continuing a policy without notice.

A time policy upon freight was effected with a mutual assurance club, subject to the rules thereof, one of which in effect provided that upon expiration of the time the policy should be renewed by the committee of the club unless notice to the contrary were given to or by them within a specified period before. No such notice having been given, it was held a continuing policy.³ But when a policy was vitiated by concealment of a material fact on the part of the assured's agent, and afterwards the insurer upon learning what had happened, wrote the agent in these words:—"Understanding that the steamer B. has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired,"—this letter, to which no answer

¹ *Xenos v. Wickham*, L. R., 2 H. of Lds. 296; 33 L. J. (C. P.) 13; 14 C. B., N. S. 452; *Cox v. Troy*, 5 B. & Ald. 474. For limited effect that may be given to delivery out of a policy, see *Morrison v. Universal Mar. Ins. Co.*, L. R., 8 Exch. 197.

² *Robinson v. Tobin*, 1 Stark. R.

336.

³ *Michael v. Gillespy*, 2 C. B., N. S. 627; 26 L. J. (C. P.) 306. The legal effect of the word *continuing* here must be taken to be *renewed*. See *Lishman v. Northern Marit. Ins. Co.*, L. R., 8 C. P. 216; and 30 Vict. c. 23, s. 8.

was returned, was held not to have created a fresh contract of insurance. At most it was an unaccepted proposal, and whether the agent without express authority could have accepted it was doubted.¹

The assured, after acceptance of a valid policy, may forfeit all benefit under it, for instance, by breach or non-performance of one of the warranties expressed or implied in the instrument itself, or of a condition precedent under which the instrument was granted,² or by such an alteration of the instrument as, at common law or by virtue of the Stamp Acts, renders it a nullity, or by such illegality affecting the assured adventure that it becomes incapable of protection under the sanction of law.

Forfeiture of policy.

The rescission of the contract must be the act of both parties to it, the assured and the insurer. The insurance broker, acting for the former, has no implied authority, merely by virtue of his capacity as such agent, to demand or consent to the cancellation of the policy,³ although it had been left in his hands. But the conduct of the principals in this matter may be so ambiguous that their intention may become a question of law for the Court upon the construction of their written communications, or a question of fact for a jury upon consideration of what was said and done between them.

Cancellation of the policy.

For instance, the assured may have sold the whole of his interest without, at the same time, parting with the policy, and whether, under all the circumstances of the case, he meant to keep it alive, as holding it in trust for the vendee, or to let it become a nullity, may be the question. A cargo of wheat was insured from Galatz to Emden and a port of discharge in the United Kingdom, to return a percentage

¹ *Russell v. Thornton*, 4 H. & N. 788; 29 L. J. (Ex.) 9; (in error) 6 H. & N. 140; 30 L. J. (Ex.) 69.

² *Hughes v. Tindall*, 18 C. B. 98;

Turnbull v. Woolfe, 9 Jur., N. S. 57.

³ *Xenos v. Wickham*, L. R., 2 H. of Lds. 296; 14 C. B., N. S. 452; 33 L. J. (C. P.) 13.

of the premium in case the risk were terminated at Emden; the wheat being sold while on the voyage from Galatz to Emden, the vendor transferred the policy to the vendee, and claimed from the underwriter a return of premium for terminating the risk at Emden; but the policy was afterwards put in suit by the vendee for a total loss between Emden and the United Kingdom, and whether the vendor had done all that was requisite to cancel the policy, as against the vendee for the subsequent part of the risk, was the question. This was determined against the plaintiff by the bought and sold note, which showed that he purchased the wheat at so much a quarter, "including freight and insurance to Emden."¹

A vessel insured against fire for twelve months, ending the 29th of July, arrived at Liverpool on the 12th of April, and the assured wrote a letter to the insurance broker, proposing a cancellation of the policy and return of premium, "say from the 12th of April." The other sent for the policy "to put forward returns for cancellation," and received it. On the 21st of April, the broker cancelled it on the terms of returning premium from the 30th April to the 30th July, alleging a custom of insurance brokers not to reckon broken months. The ship was burnt on the 22nd April, and that same day the assured wrote a letter, withdrawing his proposal to cancel, as he had then received no answer,—and whether, under these circumstances, there had been a cancellation, and on what terms, was the question. It was held that the broker, by sending for the policy on receipt of the proposal to cancel, must be taken to have acceded to the terms proposed, and to have cancelled on those terms. The plaintiff therefore lost the insurance, and recovered the difference on the return of premium for the period between the 12th and 30th April.²

A policy on ship from Liverpool to Philadelphia and

¹ *Ionides v. Harford*, 29 L. J. (Ex.) 36; *S. P. North of England Oilcake Co. v. Archangel Marit. Bk. and Ins.*

Co., L. R., 10 Q. B. 249.

² *Baines v. Woodfall*, 6 C. B., N. S. 657; 28 L. J. (C. P.) 338.

United Kingdom was altered by memorandum substituting Baltimore for Philadelphia, and was afterwards further altered by this memorandum, "In consideration of an additional premium, it is hereby agreed to allow the vessel to go to Antwerp." In this state of the policy, the ship arrived at Antwerp and was ordered to Leith, but was lost on her way thither. It was held that she was uninsured at the time of the loss, as the effect of the second memorandum was to terminate the risk at Antwerp.¹

The principles which govern the construction of sea-policies do not vary from those applicable to all other mercantile instruments.

The principles of construction applicable to sea-policies.

The language of sea-policies is frequently indeterminate, ambiguous, or technical. When this is so, but never otherwise,² parol evidence, as in the case of other contracts, is admissible to explain it. The language of sea-policies is also frequently incomplete as an expression of the meaning of the parties, because it is employed, and is understood so to be, with reference to the usages of trade:³ in this latter class of cases (and they are very numerous) the meaning of the contract embodied in a sea-policy, even where the language of the policy is on the face of it unambiguous, may, nay must, be explained by parol evidence of those usages, a knowledge of which in such cases forms the only available key to the real intention of the parties.⁴

In these cases, "the question," says Lord Mansfield, "is whether the usage has not explained the generality of the words. If it has, every man who contracts under a usage, does it as if the point of usage were inserted in the contract

¹ *Stone v. Mar. Ins. Co. Ocean Limited of Gothenburg*, 1 Exch. D. 81.

² *Blackett v. Royal Exch. Ass. Co.*, 2 C. & J. 244.

³ Judge Duer very correctly ex-

presses it, "not of trade in the largest sense of the word, but of that export and import trade which is conducted by navigation." 1 Duer, 180.

⁴ *Mason v. Skurray*, 1 Marsh. Ins. 218; 1 Park, Ins. 253.

in terms.”¹ The notion, however, which appears at one time to have prevailed (favoured unquestionably by certain reported expressions of the earlier Judges), that sea-policies were not amenable to the rules of construction generally applicable to all other mercantile contracts, but were to be interpreted so as to carry out the assumed intentions of the parties, even though repugnant to the terms in which their intentions purported to be expressed on the face of the instrument itself, must now be regarded as erroneous.²

Parol evidence, whether of usage or otherwise, can in no case be admitted to contradict or materially vary the plain and express terms of a sea-policy. It can only be admitted either to explain those terms where they are technical or ambiguous, or to modify or add to them where they are plainly employed with reference to some usage of trade, and where, without such reference, they would accordingly be incomplete as an expression of the mind of the parties contracting. In such cases the Courts, in order to effectuate the real intention of the parties, will resort to such means of

¹ It is to these cases (viz., where the terms of the policy are employed with reference to the usages of trade, and incomplete as an expression of the meaning of the parties without such reference) that we must apply the strong expressions of Lord Mansfield and some other Judges as to the force of usage in interpreting policies. Thus, in *Preston v. Greenwood*, 4 Dougl. 28, Lord Mansfield says, “Usage is always considered in policies of insurance, even where the words are plain;” and Buller, J., in *Long v. Allen*, *ibid.* 276, “In policies of insurance in particular, a great latitude of construction as to usage has been admitted;” and again (which is the strongest expression on the subject to be found in the books), “Usage not only explains but controls the policy.” Judge Duer considers Buller, J., strictly accurate in

the use of the word *control*, which, as he truly states, does not necessarily imply to contradict. “The distinction made by the learned Judge between explaining and controlling really does exist. Where the words to be interpreted are indeterminate or ambiguous the usage explains them; but when they convey a definite meaning that the Court would be bound to adopt, or their construction has been settled by law, the usage controls them; and in these cases it does set aside what, judging only from the terms of the policy or the rule of law, was the plain intention of the parties, but, in controlling, the usage does not contradict the words, it merely varies, by restraining or enlarging, their application.”

1 Duer, 245, 246.

² See *Weston v. Emes*, 1 Taunt. 115.

interpreting the policy as may be supplied either by the rules of the common law, the general usages of trade, or the particular circumstances of the case.¹

"The same rule of construction," says Lord Ellenborough, "which applies to other instruments, applies equally to this, viz., that it is to be construed according to the sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance; and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense."²

The following are some of the more prominent rules of construction that appear to have been acted upon by our Courts in the interpretation of sea-policies. General rules.

1. Every usage of a particular branch of maritime trade

¹ See 1 Emerigon, c. i. s. 5, p. 17, and c. ii. s. 7, pp. 55, 56; see the judgment of Lord Denman in *Trueman v. Loder*, 11 A. & E. 589; and that of Story, J., in the *Schooner Reeside*, 2 Sumn. 567; see also the admirable remarks of Mr. Chancellor Kent (Com. iii. p. 260, and note *f*); and especially the two very able and elaborate chapters (with their notes and illustrations) which Judge Duer devotes to the consideration of this subject (1 Duer, 158-311). "The meaning of the rule excluding parol evidence is, that such evidence shall never be received to show the intention of the parties to have been directly opposite to that which their language expresses, or substantially differing from any meaning which

the words they have used upon any construction will admit or convey; but there are cases in which the language of a policy, in entire consistency with the rules of law, may be interpreted in different senses, or with a modification which, though not express, is implied; in such cases parol evidence may be admitted to determine the construction that, following the intention, ought to be adopted. The admission of such evidence varies the construction of the contract, but does not contradict or vary the agreement embodied in the policy; on the contrary, it establishes its true meaning." 1 Duer, 176, 177.

² *Robertson v. French*, 4 East, 130, 135.

1. Every well-settled usage of the trade is *prima facie* part of the policy.

which is so well settled, or so generally known, that all persons engaged in it may fairly be taken as contracting with reference to that usage, is considered as forming part of every sea-policy designed to protect risks in such trade, unless the express terms of the policy decisively repel the evidence.¹ Nor need any evidence be given in such cases that the usage has been communicated to the underwriter; for, as Lord Mansfield says, "every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself."² The description of the voyage in the policy, he says, in another case, "is an express reference to the usual manner of making it, as much as if every circumstance were mentioned" on the face of the instrument. "What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed."³

China trade.

It had been the custom for many years in the China trade for all European ships, while at Canton, to store their rigging and furniture in houses, built for that purpose on sand banks in the Canton river, called bank-sauls; it was held therefore, that every underwriter insuring a risk in the Canton trade, must be considered to have done so with reference to this usage; and that the underwriter was, therefore, as much liable for a loss by fire happening to the rigging so stored, as for any similar loss occurring in any other part of the adventure.⁴

East India trade.

It was formerly the uniform and well-known practice of the East India Company to reserve in their charter-parties the liberty of employing the vessel in what is called the

¹ See where in case of a fire policy the terms used did repel the evidence, *Pearson v. Commercial Union Ass. Co.*, L. R., 8 C. P. 548; 1 App. Cases, 498.

² Lord Mansfield in *Noble v. Kennoway*, 2 Dougl. 510, 513; and Lord Ellenborough in *Da Costa v. Ed-*

munds, 4 Camp. 142, 143.

³ Lord Mansfield in *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341, 350; per Lord Lyndhurst, *Blackett v. Royal Exch. Ass. Co.*, 1 Cr. & J. 249.

⁴ *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341; *Brough v. Whitmore*, 4 T. R. 206.

country trade, that is, on intermediate voyages from one port to another in India; and all parties engaged in this trade were taken to be fully cognizant of the usage. Accordingly, under policies on ships employed by the company, though nothing was said of an intermediate voyage in the policy, yet, because the voyage insured was known by the underwriter to be an East India voyage, the Courts held that he must be presumed to have contracted with reference to all the known usages of the East India trade; and, therefore, that the construction of the policy should be the same as if liberty had been expressly reserved on the face of it, to make such intermediate voyage.¹

In the Newfoundland and Labrador trades, where the main object of the voyage is to take fish, it is a well-known and general usage that the cargoes insured on such voyages, being chiefly salt and provisions, are taken out as they are wanted, and not landed, like other cargoes, on arrival; under an insurance, therefore, on such a fishing voyage, on "goods" in the usual form, "until discharged and safely landed," it was held that the underwriter must be taken to have insured with full cognizance of this usage, and could not exempt himself from liability for a loss, although it had not taken place until long after the time when, but for the custom of the trade, his liability under the mere terms of the policy would have been at an end.²

It is also a well-understood and familiar usage of the Newfoundland trade, that the ships engaged in it, after their arrival at Newfoundland, are either engaged for some time in fishing (called banking), or they make intermediate voyages from one American port to another, before beginning to load a cargo for the homeward voyage. It has been

¹ *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Dougl. 419; *Farquharson v. Hunter*, 1 Park. Ins. 105.

² *Noble v. Kennoway*, 2 Dougl. 510. The voyage in this case was to

the coast of Labrador, but evidence was admitted to show the usage in such case to be the same as on fishing voyages to the coast of Newfoundland.

ruled by Lord Eldon and by Lord Ellenborough, that underwriters, who had insured homeward risks on ships engaged in this trade, under policies "at and from Newfoundland," were bound to know this usage; and were not entitled to contend that such intermediate voyages vitiated the policy by varying the risks they had intended to insure.¹ "According to the general import of the words 'at and from,'" says Lord Ellenborough, in one of these cases, "the policy would attach on the ship's first mooring in a harbour on the coast, but it doubtless may be explained differently by usage, and as between these parties, the policy must be taken to be the same as if it had been expressed to attach on the expiration of the banking or intermediate voyage."² This certainly seems an instance of usage being permitted to control the general import of a clause in the policy, as fixed by legal construction.

Usage affecting the commencement and termination of the risk.

The commencement and termination of the risk may be varied by the customary usage of particular ports from that which upon the general construction of the policy they would otherwise have been.

Oporto trade.

Thus, by a well-known usage in the Oporto trade, ships complete their loading for the homeward voyage outside the bar, whenever, from the low state of water in the Tagus, they cannot conveniently do so within; and an underwriter on a policy "at and from Oporto to London," was not discharged from liability by the ship, without his knowledge,

Florida trade.

loading outside according to usage.³ So, in the Florida trade, ships customarily take in their homeward cargoes at Tigre Island in St. Mary's river, and then drop down to

¹ Vallance *v.* Dewar, 1 Camp. 503; Ougier *v.* Jennings, *ibid.* in *notis*, per Lord Eldon in 1801, when Chief Justice of the Common Pleas.

² 1 Camp. 508.

³ Kingston *v.* Knibbs, 1 Camp. 508, in *notis*, a very strong case, as it appeared that in such policies

liberty is often expressly given to load on either side of the bar; so that the underwriter might not unfairly have contended that he was misled by the omission of this stipulation. Accord. the cases in the East India trade referred to *ante*, p. 279, note 1.

Amelia Island, a little lower down the river, for the purpose of paying dues and clearing; an underwriter, on goods "at and from the ship's loading port or ports in Amelia Island to London," was not entitled to object that the policy never attached, because the goods had been loaded, not at Amelia Island, but at Tigre Island.¹

On proof of an ancient custom at the port of Leghorn, At Leghorn. that certain goods for that port should be invariably landed at the Lazaretto, it was held in the United States, in the case of an insurance on such goods, "till they were safely landed at Leghorn," that such landing at the Lazaretto was in virtue of the custom equivalent to a landing at Leghorn.²

Under a policy on ship at the Mauritius, and for thirty "Arrival." days after arrival, evidence was admitted of a usage to anchor at the Bell Buoy, outside the harbour of Port Louis, where vessels calling for orders, seeking freight, or receiving or discharging part—not the whole—of their cargo, waited, and that they were then considered to be at the Mauritius, and a total loss at this place within the thirty days was held to be covered by the policy.³

From the rule thus illustrated, it follows by way of corollary, that if the usage of the particular trade with reference to which the underwriter insures, is opposed to any of those general usages of maritime traffic, with reference to which all policies are *prima facie* supposed to be made, the former is to be taken as the true key to the construction of the policy.

Particular usage prevails over general maritime usage.

On an insurance on goods, the underwriter is in general entitled to expect that they will be stowed away in the hold, and not on deck, which is regarded as an unusual and dangerous place for that purpose; and every policy is read as

Goods carried on deck by usage.

¹ *Moxon v. Atkins*, 3 Camp. 200. In this case it should be remarked that, as there were no ports at all in Amelia Island, the policy could not be construed literally.

² *Gracie v. Maryland Ins. Co.*, 8 Cranch's Sup. Ct. R. 75.

³ *Janson v. Lindsay*, 23 L. J. (Ex.) 315; 4 H. & N. 699. See the effect of usage at the port of Liverpool on the law of demurrage, *Norden Steamship Co. v. Dempsey*, 1 C. P. D. 654.

though it contained an exemption in terms from all liability on goods so carried.¹ But whenever it can be shown that, by a well-settled and generally-known usage of the particular trade on which the underwriter insures, goods of the specific description of those insured in the policy are customarily carried on deck, the more general usage gives way to the more particular one, and the underwriter is liable for any loss upon the goods so carried, without any necessity of proving notice.²

Stopping at
interjacent
port.

It is a general usage, impliedly incorporated into all policies, that the ship shall pursue a direct course between the two termini of the voyage, without stopping at any intermediate places; if, however, it be the notorious and well-settled usage of any given trade to stop at certain interjacent ports, the particular usage would doubtless countervail the general maritime usage, and such stopping, though not authorized expressly, be deemed no deviation.³

Return of
premium.

Again, it is a general rule, that where the risk and premium are both entire, if the policy once attach, the whole premium is retained. Yet Lord Mansfield, in an action for return of premium, admitted evidence of a constant and invariable usage in the trade between London and Jamaica, infringing this rule in particular cases.⁴

Liberty "to
touch."

If the construction of a clause is not settled and fixed, but comparatively doubtful, evidence of usage is *à fortiori* admitted to explain the sense in which it is intended in the particular policy. Thus, a clause giving "liberty to touch" at certain islands, was held by the Court of Common Pleas, upon evidence of a usage in the trade, to cover not only calling at the island in question, but also taking in salt.⁵

¹ See the judgment of Lord Lyndhurst in *Blackett v. Royal Exch. Ass. Co.*, 2 Cr. & J. 244, 249, 250.

² *Da Costa v. Edmunds*, 4 Camp. 142; *Gould v. Oliver*, 4 Bing. N. C. 134; *Milward v. Hibbert*, 3 Q. B. 120; *Miller v. Titherington*, 6 H. & N. 278; 30 L. J. (Ex.) 217; (in error) 7 H. & N. 954; 31 L. J. (Ex.)

363; *Johnson v. Chapman*, 35 L. J. (C. P.) 23.

³ 1 *Marshall, Ins.* 186; 1 *Phillips, Ins.* no. 133 et seq.

⁴ *Long v. Allen*, 4 Dougl. 276; 2 *Park, Ins.* 797; 2 *Marsh. Ins.* 668.

⁵ *Urquhart v. Bernard*, 1 Taunt. 450.

2. A usage, in order to be binding, must be either a general and notorious trade usage of the whole mercantile world (of which the Court will take judicial notice), or a particular proved usage of universal prevalence and notoriety in the trade upon which, and of the place in respect of which, the insurance is effected: the usage of a particular place, or of a particular class of persons, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it.¹

2. The usage must be general and notorious in the particular branch of trade.

"To make an usage obligatory on the parties," says Story, J., "it should be so well settled, that all persons engaged in the trade must be considered as contracting with reference to it."² Hence, where in case of an insurance effected from Liverpool to Jamaica, the ship put into the Isle of Man; and it appeared that ships bound on this voyage sometimes put in there, but not usually: it was held, that this proof did not amount to such a well-known and settled usage of the trade between Liverpool and the West Indies, as to prevent this from being a deviation.³

It must be well settled,

The usage need not, in the strict sense of the word, be uniform, that is, followed invariably and without exception at all times and by all persons in the trade to which it relates; it is enough that it be general. Thus, in the case of intermediate voyages in the Newfoundland fishery trade already referred to, it was objected before Lord Ellenborough, that the suggested usage was not uniform, for whenever a ship engaged in the trade could procure a cargo on her arrival at Newfoundland, she preferred returning direct to Europe to taking an intermediate voyage in America. As

and general, if not uniform.

¹ Per Lord Tenterden in *Bartlett v. Pentland*, 10 B. & C. 760, 770; see *Miller v. Titherington*, 6 H. & N. 278; so per Cur. in *Norden Steamship Co. v. Dempsey*, 1 C. P. D. 654; *Ward v. Harris*, 8 L. R., Ir. 365, C. A.

² In *Trott v. Wood*, 1 Gallison's Rep. 444, cited by Mr. Phillips, vol. i. no. 138.

³ 1 *Marshall, Ins.* 186; *Salisbury v. Townson*, *Millar, Ins.* 418; *Martin v. Delaware Ins. Co.*, *Condy's Marshall*, 186, n.

to this objection, his Lordship said, "Although there should be exceptions to the usage, that would be immaterial. Things are presumed to go on in their ordinary course, and if a usage be general, though not uniform, the underwriters are bound to take notice of it."¹

It must be
notorious.

The usage must be notorious. It must have existed under such circumstances, or for such length of time, as to have become generally well known to all persons concerned in or about the branch of trade to which it relates, and so as to warrant a presumption that contracts are made with reference to it."²

Although the
trade be of
recent origin.

If the usage proved can satisfactorily be shown to have been general and notorious, as long as the course of trade in which it prevails has lasted, it makes no difference that such trade is itself of recent origin. Thus, when the trade to Labrador, which was first opened to English shipping after the Peace of Paris 1763, had been carried on only three years, Lord Mansfield held, that a custom, which had been invariably observed ever since its opening, was binding on those who insured on Labrador risks, as though the trade itself had been of much longer continuance. In this case, Lord Mansfield considered that evidence of a usage which had prevailed in one trade, was rightly admitted to prove that the same usage was binding on those engaged in another trade of the same kind, carried on under similar circumstances in the same way.³

¹ Vallance *v.* Dewar, 1 Camp. 503; see also 1 Duer, 264, 265. Judge Duer is of opinion (p. 265) that when "the usage settles the construction of the policy, or supersedes a rule of law, its constancy of observance, to render it binding, must be invariable;" *sed quære*.

² I adopt this test, with a slight difference in the phraseology, from the judgment of the Supreme Court of New York in *Smith v. Wright*, 1 N. Y. T. Rep. 45, cited by Judge Duer, vol. i. p. 267, n. (a).

³ *Noble v. Kennoway*, 2 Dougl.

510. Judge Duer remarks, and very properly on this case, that as the observance of such a usage seems to have been almost a necessary result from the nature of the trade, the Court were probably satisfied with slighter proof of its existence than they would otherwise have required; 1 Duer, 255.

As to when a usage of recent origin becomes binding in law, see the judgment per Cockburn, C. J., in *Goodwin v. Roberts*, L. R., 10 Ex. 337, 346; 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

It need hardly be said that such usage must be reasonable. The usage must be reasonable. When the case of intermediate voyages in the Newfoundland fishing trade came before Lord Eldon, he is reported to have said to the jury as to this point, "If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect.— If you think this usage does exist, if you think it reasonable, and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff."¹ Lord Eldon could hardly have meant by this to leave the question of reasonableness to the jury (a question always, it should seem, for the Court); what he intended must have been to ask them, whether they thought the evidence established the existence of such a usage as he had already pointed out as reasonable, or of one which, as he had already told them, was too dangerous to give effect to.

It is not an unfair presumption that the parties, in effecting the policy, have contracted with reference to usages which are either common to all trades, or perfectly well known and settled in the particular trade to which the insurance relates. But with regard to usages which only prevail in a given place, or amongst a particular description of persons, the presumption is the other way; and in such cases, accordingly, it must be satisfactorily shown, that the party sought to be affected by the usage had knowledge of it at the time of making the contract. In the words of Lord Tenterden: "The usage of a particular place or a particular class of persons, cannot be binding on non-residents or on other persons, unless they are shown to have been cognizant of it."

We had in a former chapter² frequent instances of the application of this rule in respect of the usages at Lloyd's. Usages at Lloyd's. We saw that although clear proof be given of a particular usage being established at Lloyd's, and the fact be, that the

¹ *Ougier v. Jennings*, 1 Camp. 506, in notis; see 1 Duer, 269.

² Ante, Chap. IV. p. 199.

policy was effected by a broker at Lloyd's, in the common course of business, for a party resident in this country; yet the assured cannot be affected by the usage, unless it be further shown, either that he was actually cognizant of it, or from his general mode of dealing, habits of life, or place of business, cannot be supposed to have been ignorant of it.¹

Cases illustrative of this point.

A Liverpool house, through the agency of a London broker, effected a policy at Lloyd's, on horses "warranted free of jettison and mortality," from Liverpool to Jamaica. During a storm in the course of the voyage three of the horses were kicked to death by the others; and the underwriters, to a claim for this loss, set up a usage of Lloyd's, not to pay a loss on live stock by mortality occurring in the course of the voyage, except where the ship was lost before arrival. In the case stated for the opinion of the Court, there was no finding that the plaintiff was cognizant of the usage, and the Court therefore held that the plaintiff was not bound by it.²

By general usage in the law merchant, the insurance broker is considered as debtor to the underwriter for premiums, and the underwriter as debtor to the assured for losses;³ there is a custom, however, at Lloyd's, well known to those who do business there, for the brokers to settle with the underwriters according to the state of the accounts between them, in which accounts the broker is debtor to the underwriter for premiums, and the underwriter is debtor to the broker for losses, and by the usage such settlement in account is considered as payment.

But whether the assured is bound by such a settlement, so as to oblige him to look to the broker only for what before the settlement was a debt due from the underwriter, depends

¹ *Gabay v. Lloyd*, 3 B. & Cr. 793; *Bartlett v. Pentland*, 10 B. & Cr. 760; *Scott v. Irving*, 1 B. & Ad. 605; *Stewart v. Aberdeen*, 4 M. & W. 211; *Sweeting v. Pearce*, 29 L. J. (C. P.) 265; 7 C. B., N. S.

449; (in error) 9 C. B., N. S. 534; 30 L. J. (C. P.) 109.

² *Gabay v. Lloyd*, 3 B. & Cr. 793.

³ Per Lord Tenterden in *Bartlett v. Pentland*, 10 B. & Cr. 780.

on his cognizance of the usage, as we have seen at considerable length in a previous chapter.¹

3. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case.

3. Patent or latent ambiguity of words.

The words and phrases employed in policies may be obscure in themselves, as when they are entirely technical and local, so as, without explanation, to be quite unintelligible to the generality of persons; in this case, their ambiguity of meaning appears upon merely reading them as they stand in the instrument; it is patent on the face of it. Again, the words employed may have an ordinary meaning intelligible to people in general without reference to any particular business; yet, if they have also another meaning peculiar to a particular business, and the circumstances of the case show that such secondary or less general sense is that in which they are used in the instrument of which the meaning is to be ascertained, parol evidence may be resorted to in this case also, to explain the real meaning of the contract, by showing the sense in which the parties to it employed their words.²

Several instances of the application of this rule have arisen in the construction of the memorandum by which the underwriters exempt themselves from liability on certain perishable articles: thus, evidence of usage has been admitted to show that the term *corn*, as used in the memorandum, is meant to comprehend every sort of grain, and also beans, peas,³ and malt;⁴ but that it does not include rice:⁵ also that the term *salt* does not include saltpetre.⁶

¹ Ante, Chap. IV. p. 199.

² See Broom's Legal Maxims, pp. 588, 590.

³ Mason v. Skurray, 1 Park, Ins. 245.

⁴ Moody v. Surridge, *ibid*.

⁵ Scott v. Bourdillion, 2 B. & P. N. R. 213.

⁶ Per Wilson, J., in Journu v. Bourdieu, 1 Park, Ins. 245.

Upon the same principle, in the United States, where the memorandum contained the exception of *roots*, the evidence of mercantile men was admitted to show that the word as used in the memorandum was in practice, with reference to other mercantile contracts, confined in its application to perishable roots, such as beets and other garden roots; and therefore that sarsaparilla, being a dry hard root and not liable to decay, was not included in the memorandum.¹ So, in a policy on furs, similar evidence was admitted to prove that the word *skins* in the memorandum should not exempt the underwriter from liability to an average loss on bear skins; it being shown that such skins were chiefly valuable as furs.²

In a case before Lord Mansfield, where the insurance was on ship, furniture, &c., in the usual words of the printed sea-policy, the ship was employed in the Greenland fishery, and the question was, whether the words of the policy covered fishing tackle and stores; his Lordship said this would depend on the usage of trade, and admitted evidence of such usage accordingly.³

“With or without letters of marque.”

A vessel was insured “either with or without letters of marque,” the intention of course being to have the liberty of exercising the power, but to what extent, whether solely in acting on the defensive, or in giving chase, or in cruising generally, were questions not settled by the obvious and general import of the words; Lord Ellenborough said, “It may be material to ascertain in what manner parties to contracts containing this form of words have acted upon them in former instances, and whether they have obtained, as between the assured and assurers, any known and definite import.”⁴

¹ *Coit v. Commercial Ins. Co.*, 7 Johnson's N. Y. Rep. 385. The words of the memorandum in this case were “roots and all other articles of a perishable nature,” so that the very language of the clause formed a clue to its construction.

² *Astor v. Union Ins. Co.*, 7 Cowen's Rep. 202.

³ *Hoskins v. Pickersgill*, 2 Marsh. Ins. 735; 1 Park, Ins. 126.

⁴ *Parr v. Anderson*, 6 East, 202, 207.

The risk on ship and goods is often specified to begin and end from their arrival at, sailing from, or loading at one port, until their arrival or safe discharge at another port: in these cases the meaning in which the word port is used in the policy must be ascertained by admitting parol evidence to show what meaning and extent, in the general understanding of the mercantile world, is attached to the word port as applied to the place where, by the policy, the risk is made to begin or end;¹ and although the mercantile sense attached to the term may give the port in question a greater or a less extent than its legal or political limits, yet the mercantile sense, and not the legal import of the word, shall prevail. Thus, although Llanelly is, legally speaking, considered to be a part of the port of Carmarthen, and Bridport of the port of Lyme Regis, yet neither was considered to be so, within the meaning of the words "port of Carmarthen"—"port of Lyme Regis," in a policy of insurance; those words meaning, in mercantile usage, "the town and port of Lyme Regis,"—"the town and port of Carmarthen."²

Where words descriptive of seas or countries have acquired a sense among mercantile men differing from their common geographical import, parol evidence of the meaning put upon them by the mercantile world is admissible, to show the sense put on them by the parties to the policy.

Thus, under a policy "from Van Diemen's Land to a port or ports of loading in India and the Indian Islands," the Court held that, though amongst geographers, Mauritius was deemed an African island, yet parol evidence was admissible to prove that in commercial language it passed for an Indian island.³ So, where an insurance was "from London to any port in the Baltic," and the vessel sailed for Revel, in the Gulf of Finland, which, among geographers, is considered a

¹ *Constable v. Noble*, 2 Taunt. 402; *Payne v. Hutchinson*, *ibid.* 405 in *notis*; *Cockey v. Atkinson*, 2 B. & Ald. 460; *Brown v. Tayleur*, 4 A. & E. 241; see *MacLachlan, Shipping*, p. 377.

² *Constable v. Noble*, 2 Taunt. 402; *Payne v. Hutchinson*, *ibid.* 405. See per Brett, M. R., in *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. D. 580.

³ *Robertson v. Clarke*, 1 Bing. 445.

different sea from the Baltic, yet, upon evidence that it is comprehended in the Baltic in commercial language, the Court gave this extension to the term *Baltic* in the policy.¹

No usage.

But in the absence of any such usage or custom among mercantile men, with regard to the phraseology to be found in the policy, the meaning and effect must be ascertained by the ordinary general rules of construction; thus, in a policy on ship in which the warranty was "No St. Lawrence between" certain dates, it was held that both the river and the Gulf of that name were within the terms of the warranty.²

"Cargo."

Where a question arose in an action on a policy as to the meaning of the word "cargo," Tindal, C. J., ruled that, as it was a term of mercantile import, its sense, as used in the policy, was a question for the jury, and could not be decided by the dictionary.³ So with regard to "freight," Story, J., on the ground that it was a word which, in common parlance, has several meanings, admitted parol evidence to be given of the circumstances under which the contract was made, in order to show its meaning in the particular case, as, for instance, whether it meant "goods on board ship," or "an interest in the earnings of the ship."⁴

"Premises."

A river steamer in Canada was insured against fire in a form of policy applicable to buildings, the parties probably forgetting to strike out the condition that if more than 20 lb. weight of gunpowder were on the *premises* at the time of the loss, the insurers should not be liable. This condition was held by the Privy Council to be incorporated with the contract, and that although the word *premises* was popularly applied to buildings, it was still applicable to the ship, in the ordinary legal sense of the term, as designating the subject or thing previously spoken of.⁵

¹ Uhde v. Walters, 3 Camp. 16; see also Moxon v. Atkins, *ibid.* 200.

² Birrell v. Dryer, 9 App. Cas. 345.

³ Houghton v. Gilbert, 7 C. & P. 701.

⁴ Peisch v. Dixon, 1 Mass. Rep. 10;

¹ Duer, 168, 169.

⁵ The Beacon Fire and Life Ass. Co. v. Gibb, 1 Moore, P. C., N. S. 73. See Quebec Marine Ins. Co. v. Commercial Bk. of Canada, L. R., 3 P. C. 234.

4. Resort to parol evidence, however, whether of usage or otherwise, is only permitted in order either to explain the policy where it is technical or ambiguous, or to fill out and add to it where it is silent: such evidence will never be admitted to contradict, set aside, or control its express, plain, and unambiguous terms.

4. Usage only to explain the doubtful, not to contradict the plain.

No evidence can be admitted of a usage which is at direct variance with the plain terms of the policy. It may be admitted to explain technical terms or ambiguous clauses, or "to introduce matter on which the policy is silent," but not to show that the policy has a meaning in plain opposition to its language; "usage is only admissible to explain what is doubtful, never to contradict what is plain."¹

"Usage," says Lord Campbell, "may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; and a usage consistent with a written contract may be introduced into it; as both parties being aware of it, may be supposed to have intended that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been made."²

"Where the terms," says Judge Duer, "in which the usage must be expressed, if introduced into the policy, would be directly and irreconcilably repugnant to an express clause or provision, the evidence must doubtless be rejected; otherwise the policy would be void for uncertainty. A usage may explain, modify, and control, but cannot contradict a policy; by restriction or addition it may qualify the construction of

¹ Per Lord Lyndhurst, in *Blackett v. Royal Exch. Ass. Co.*, 2 Cr. & J. 244.

² *Hall v. Janson*, 4 E. & B. 504; 24 L. J. (Q. B.) 101. See the judgment of the same learned Judge in *Humfrey*

v. Dale, 26 L. J. (Q. B.) 137; 7 E. & B. 266; *S. C.* (in error) 27 L. J. (Q. B.) 390; E., B. & E. 1004; *Brown v. Byrne*, 23 L. J. (Q. B.) 313; 3 E. & B. 703.

particular words and clauses, but can never be permitted to nullify or expunge them.”¹

Parkinson v.
Collier.

These principles, notwithstanding some apparent discrepancy in the expressions of the Judges, have been uniformly acted upon in the construction of sea-policies. Thus, where the risk on goods was, by the policy, made to continue “till discharged and safely landed,” Lord Kenyon would not admit evidence of usage to show that this expression, in the particular trade insured, meant “until the ship was moored twenty-four hours in safety;” because this was inconsistent with the plain meaning of the policy, which was too clearly expressed to require or allow of any such explanation.²

Blackett v.
Royal Exch.
Ass. Co.

So where a policy was in the common form upon the ship, that is, “upon the body, tackle, apparel, ordnance, munition, boat, and other furniture of the ship called *The Thames*,” Lord Lyndhurst would not admit evidence of a usage at Lloyd’s, that boats slung on the ship’s quarter (which was proved to be the invariable mode of carrying them on such voyages as that insured) were not protected by such policy.³ “The objection,” said his Lordship, “to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter on which the policy was silent, but was at direct variance with the terms of the policy and in plain opposition to the language it used; that whereas the policy purported to be upon the ship, furniture, and apparel generally, the usage is to say, that it is not upon all the furniture and apparel, but upon part only, excluding the boat.”⁴

Crofts v.
Marshall.

On the same ground, in a case where it appeared that oil had been lost by leakage, caused by the violent labouring of the ship in a cross sea, Lord Denman refused to admit

¹ Duer, 270. He accepts the word “control” from Buller, J., and defends it: ante, p. 276, note.

² Parkinson v. Collier, 2 Park, Ins. 653; 1 Marshall, Ins. 255.

³ Blackett v. Royal Exch. Ass. Co., 2 Cr. & J. 244.

⁴ Per Lord Lyndhurst, 2 Cr. & J. 244, 249.

evidence of a usage at Lloyd's to the effect that unless the cargo shifted, or the casks were damaged, underwriters were not liable for any extent of leakage, however caused, as a loss by perils of the sea. His Lordship told the jury to consider for themselves whether, in their opinion, the damage to the oil was in fact caused by perils of the sea;—"It may be very convenient for the underwriters to have such a general rule, and for the commercial world to submit to it; but if they mean thereby to control the effect of a plain instrument, they should introduce its terms into the policy."¹

In an action for contribution in general average against one of the underwriters on a policy "on money advanced on account of freight," containing the usual clause in the memorandum by which "freight, &c., is warranted free from average under 5% per cent. unless general or the ship be stranded," the defendant set up a usage in London, not to pay general average contribution under such a policy. The Court held that this was an attempt to set up a usage in derogation and contradiction of the written contract which, by virtue of the clause in the memorandum, plainly and expressly rendered the underwriter on freight liable for general average without regard to the extent of the loss.²

Hall v.
Janson.

In defence to an action for an average loss, a usage was set up not to pay for damage to the ship below the water line unless she had taken the ground, and much evidence of average adjusters and others was admitted, subject to the opinion of the Court, whether it were admissible, but the jury negatived the existence of any such usage.³

Harrison v.
The Universal
Marine Ins.
Co.

5. The policy being a printed form with the blanks filled up in writing, it is a rule that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words; inasmuch as the written words

5. The written clauses may control the printed and formal parts of the policy.

¹ Crofts v. Marshall, 7 Carr. & Payne, 597, 607. 24 L. J. (Q. B.) 97.

³ Harrison v. The Universal Marine

² Hall v. Janson, 4 E. & B. 500; Ins. Co., 3 F. & F. 191.

are the immediate language and terms selected by the parties themselves for the expression of their meaning."¹

In a case where the Lloyd's form of policy was filled up as a time policy on ship, it was argued from the various clauses, not usually struck out and in this case left standing, referring to a voyage, that certain conditions only applicable to a voyage policy, therefore applied in the case of a policy, though in terms a time policy, to a ship insured by it, and judgment was given in the Exchequer Chamber accordingly.

"It has been suggested," said Lord Penzance, in moving the House of Lords to reverse the judgment, "that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law, to permit of any such conclusion."²

Hence it is, that in the familiar instance of words written in the margin, or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the sense of those parts of the printed policy to which they apply. So that by the word *ship*, or *freight*, or *goods*, written in the margin, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are considered as narrowed in point of construction to it.³

¹ Per Lord Ellenborough in *Robertson v. French*, 4 East, 130, 136; *per curiam*, *Gumm v. Tyrie*, 43 L. J. (Q. B.) 97; per Blackburn, J., in *Joyce v. Realm Ins. Co.*, L. R., 7 Q. B. 583; per Lord Penzance, *Dudgeon v. Pembroke*, 2 App. Cas. 284, 293;

see Kent's Com. 260.

² *Dudgeon v. Pembroke*, 2 App. Cas. 284, 293; 1 Q. B. D. 96; L. R., 9 Q. B. 581.

³ 4 East, 140; and see *Robinson v. Tobin*, 1 Stark. 356; see also *Haughton v. Ewbank*, 4 Camp. 88.

The subsequent portions of this work will furnish many instances of this rule of construction.

6. It is also a rule, founded on the same principle, that greater strictness of construction should be applied to those clauses and stipulations, which the parties have themselves introduced, than to the words of the printed formula, which are applicable generally to other cases of insurance on similar subjects and not restrained to the circumstances of the particular adventure.¹

6. And are also to be more strictly construed.

Frequent illustrations of this rule will be afforded when we come to speak of clauses giving a liberty to touch and stay, of express warranties, and other written stipulations, by which the parties to the policy seek either to enlarge or to limit the protection afforded by the common printed form.

7. If conditions which are inserted for the protection of the underwriter be ambiguous, and the ambiguity is such as to be inexplicable by extrinsic evidence if admitted, the construction will lean towards the side of the assured rather than of the insurer.²

7. As to inexplicable ambiguity.

¹ Emerigon, c. ii. s. 7, p. 55.

² *Fitton v. The Accidental Death Insurance Co.*, 34 L. J. (C. P.) 28; *Carr & Josling v. The Royal Exch. Ass. Co.*, 33 L. J. (Q. B.) 63; per Tindal, C. J., in *Borrodale v. Hunter*, 5 Sc. N. R. 446. See *Ireland v. Livingston*, L. R., 5 H. of Lds. (Eng.) 395, in which written orders from England to a commercial house abroad being susceptible of two senses, each of them consistent with the presumable intention of the principals, were held to bind the English house in the one of these senses in

which the foreign house had *bond fide* executed them. And see *Birrell v. Dryer*, 9 App. Cas. 345.

At the same time, see this rule as applied in its most inequitable severity in *Blackett v. Royal Exch. Ass. Co.*, 2 Cr. & J. 244; *Donnell v. Columbian Ins. Co.*, 2 Sumner's R. 366; and repudiated as applicable to commercial contracts, yet nevertheless applied with absolute effect to a policy of insurance, by Lord Esher in *Stewart v. Merchants Mar. Ins. Co.*, 14 Q. B. D. 555, noticed post, Part III. Chap. III.

CHAPTER VI.

VALUATION FOR THE PURPOSES OF THE POLICY.

Valuation of insurable interest - 296 theoretical principle - - 296 practical principle - - 297 Valued policies - - - 298 effect of valuation - - 299 on ship - - - 311 on freight - - - 312	on goods - - - 314 Open policies - - - 317 amount to insure - - 318 on ship - - - 320 freight - - - 321 goods - - - 321 Double and over insurance - 327
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Valuation of
insurable
interest.

WE proceed now to consider the mode of estimating the insurable value of the interest at risk, with a view to procuring indemnity for the assured in case of loss.

Theoretical
principle.

It would seem, *a priori*, that the true principle upon which the interest under a policy ought to be valued, is that which will give the assured, as nearly as possible, a complete indemnity against the consequences of loss. In *theory*, that is to say, the object of such a valuation ought to be to place the assured in exactly the same situation as he would have been in if no loss had taken place.

Let us look at the result of this principle when applied severally to the case of ship, goods, and freight.

A ship, in view of modern commerce, is regarded not as an instrument for carrying the owner's merchandise, but as in itself a source of emolument, derived from carrying goods on freight, or from performing certain contracts of affreightment on hire. Out of such freight or hire, the shipowner has to pay wages, to furnish provisions, to defray the expenses of the voyage, and also to make good that diminution in the value of the ship and her apparel, accruing from hour to hour, in the course of every voyage, which is

familiarly called the wear and tear of the ship. What remains of the freight, after deducting these charges and outgoings, is the net profit on the voyage arising to the shipowner from the employment of his capital invested in the ship.

On the principle of valuation just adverted to it is plain that the ship, for the purposes of insurance, ought to be estimated at her value after deducting the wear and tear of the voyage: for that is what the ship would have been worth to her owner on arrival, without loss or damage by the perils insured against.

So, with regard to freight, the estimation of its value for the purposes of insurance on the above principle, if such a thing were practicable beforehand, would be that sum, and no more, which the shipowner might calculate upon receiving on the safe arrival of the ship,—that is to say, the net freight, after deducting seamen's wages and the other expenses of earning it; because, in case the ship is lost, that is all the shipowner loses.

And again, with regard to goods, in order to put the merchant in the same situation as though no loss on his goods had taken place, in other words, to procure him a complete indemnity, it is clear that the value of the goods should be estimated, for the purposes of insurance, at the price which they would actually have produced, had they arrived undamaged at their port of destination, together with the freight, duty, and landing charges there payable upon them.

Such Mr. Benecke very ably points out is the only mode of estimating the value of the interest at risk, by which complete and absolute indemnity can in all cases be provided for the assured.¹

Yet this, be the reason what it may, is not the principle of valuation which has been generally adopted in the practice of our own or any other country. Parties engaged

Practical
principle.

¹ Principles of Indemnity, chaps. i., ii. pp. 1-70.

in the business of marine insurance confine themselves to an indemnity of a more limited description; the object sought by the mode of insurance generally in practice, both here and elsewhere, is to put the assured not in the position he would have occupied if no loss had been sustained, but in the position which he actually occupied at the commencement of the risk.

It is upon this basis that the insurable value of the interest at risk is invariably calculated in all open policies effected in this country. The worth of the thing insured to its owner at the outset of the risk with the expenses of the insurance is, in all open policies, its estimated value for the purposes of insurance.

As the ship in the course of every voyage is more or less diminished in value by wear and tear before the loss takes place; and as the goods would, in most instances, but for the loss, have realized a higher sum at their port of destination than at their port of loading; it is very obvious, that by this mode of insurance, the assured on ship and on freight, in case of loss, will, in all probability, receive more than an indemnity, and the assured on goods less.

Policies for the purposes of this chapter may be considered as distinguished into two classes, *valued* and *open*. These we shall discuss in their order; and first, as to valued policies.

Valued policy. The statutory form and usually every other form of policy in this country contains the following clause:—"The said ship, &c., goods and merchandises, &c., for so much as it concerns the assured, between the assured and the assurers in this policy, are and shall be valued at——."¹

What it is. The difference between an open and valued policy in point

¹ In a policy on freight the two words "as under," were added to this clause, and lower down in the margin was written "1300% on freight,"—

held, that this was not a valued policy; *Wilson v. Nelson*, 5 B. & S. 354; 33 L. J. (Q. B.) 220.

of form is solely this,—that in a valued policy this blank is filled up with the sum at which the parties agree to fix the amount of the insurable interest,—in an open policy it is left in blank.

The difference, in point of effect, between a valued and an open policy is, that under an open policy, in case of loss, the assured must prove the actual value of the subject of insurance; under a valued policy he need never do so, the valuation in the policy being conclusive between the parties, except in the case of fraud.¹ Yet the interest may be so much overvalued, that it becomes material to disclose this fact to the underwriter at the time of effecting the policy, otherwise the concealment will vitiate the contract.²

Effect of valuation.

There can now be no doubt that this is the true position. There was an opinion at one time that, although the valuation was conclusive in case of total loss, yet that in cases of average loss it was not so; as the policy was then to be opened. By this was meant that the agreed valuation was to be set aside as the standard and basis of the underwriter's liability, and the actual amount of the interest at risk proved, just as in the case of an open policy. For instance, if in case of an average loss under a policy on goods, the damage is ascertained to amount to one-fourth, instead of claiming a fourth part of the valuation in the policy, this valuation is to be disregarded, and the insurable value of the goods, *i. e.*, their prime cost, together with the premiums of insurance, &c., must be proved in order to call upon the underwriters for a fourth of the value thus proved.

Erroneous opinion.

This doctrine, wholly repugnant to the true construction of the clause on which it formed a gloss, appears to have arisen out of a dictum of Lord Mansfield, in the case of

¹ *Barker v. Janson*, L. R., 3 C. P. 303; *North of England, &c., Ins. Ass. v. Armstrong*, L. R., 5 Q. B. 244; *Lewis v. Rucker*, 2 Burr. 1167; *Shawe v. Felton*, 2 East, 109; *Be- necke*, Fr. of Indem. 152, 158;

Stevens on Average, 179–183; 2 *Phillips, Ins. no. 1189 et seq.*; 3 *Kent's Com.* 274.

² *Ionides v. Pender*, L. R., 9 Q. B. 531.

Erasmus v. Banks, where he is reported to have said, "an average loss opens the policy."¹ The phrase is unhappy, and suggestive of error, in consequence of the meaning attached to the words *open the policy*; but as it has ceased from use, and with it the error which was suggested, this notice of it may suffice.

Object of
valuation.

"The object of a valuation," says Lord Ellenborough, "is to fix an estimate on the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. If part only of the subject insured be lost, the assured can only recover in respect of that loss according to the proportion which that bears to the whole sum at which the entire subject of insurance was estimated in the policy."² By way of illustration, Lord Mansfield puts the following example:—Suppose sea-damaged goods valued at 30% in the policy to arrive at a market where, had they arrived sound, they would have sold for 50%; but arriving damaged, they only sell for 40%.—here is a depreciation of 10%, or a fifth of their sound value—the underwriter must pay a fifth of the value in the policy, *i. e.*, 6%.³

In one case, in which sugars, the invoice cost of which, together with the charges, was 1543*l.* 18*s.* 10*d.*, were valued in the policy at 1500%, no doubt seemed to be entertained that, on loss of half the sugars, the assured was entitled to half the sum at which the sugar was valued.⁴ In this case the prime cost was greater than the agreed value; but in another case, where it was less, the same rule was adhered to, and the assured, on an average loss, was held entitled to recover from each separate underwriter a sum bearing the same proportion to his subscription, as the percentage of loss

¹ Cited in *Shawe v. Felton*, 2 East, 113.

² *Forbes v. Aspinall*, 13 East, 323, 326, 327. See also *Usher v. Noble*, 12 East, 639, 646; and *Bousfield v.*

Barnes, 4 Camp. 228.

³ *Lewis v. Rucker*, 2 Burr. 1167, 1169.

⁴ *Tunno v. Edwards*, 12 East, 488.

ultimately sustained by the goods bore to the whole value in the policy.¹

In case of total loss, the value in the policy has always been held as the conclusive standard of indemnity³ between the parties; and it clearly is so in all cases, whether the loss be total or only partial.⁴ Nor is it any exception to this rule, save in appearance, that where a ship, insured in a valued policy, was sold under an Admiralty decree in a collision suit for less than the amount in the policy, the assured did not recover more than she sold for, on this obviously just ground, that the contract in the running-down clause was to bear *what the assured should be liable to pay and should pay*.⁵

The value in the policy always conclusive.²

A vessel that had been worth 8000*l.*, was so much injured at sea that she was not worth repairing; this, however, being unknown at home, she was insured, while in that condition, for 6000*l.*, valued at 8000*l.*, and after the policy attached she was totally destroyed by the perils insured against; in this case the valuation was held binding, and the policy valid.⁶

The only cases which form an exception to the generality of this rule, are cases of manifestly fraudulent valuation. "An exorbitant valuation," says Bovill, C. J., "may be evidence of fraud; but when the transaction is *bonâ fide*,

Exception.

¹ Goldsmid v. Gillies, 4 Taunt. 803. Here the invoice price of the goods was 2720*l.*, the agreed value 3000*l.*

² "For the purpose of the contract of insurance, and for the purpose of all rights arising from that contract, whether rights of indemnity or rights by way of subrogation or substitution, it may well be that the valuation in a valued policy is conclusive; but whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that, the law does not justify such a use of it." See per Selborne, L. C., Burnand v. Rodocanachi, 7

App. Cas. 333, 335.

³ Shawe v. Felton, 2 East, 109.

⁴ Irving v. Manning, 1 H. of Lds. Cases, 817; 6 C. B. 391; *S. C.* (below) 1 C. B. 168; (in error) 2 C. B. 784. See the concurrent testimony of Stevens on Average, 179-183; Benecke, Pr. of Indem. 152-158; 2 Phillips, Ins. no. 1189; 3 Kent's Com. 274.

⁵ Thompson v. Reynolds, 26 L. J. (Q. B.) 93; 7 E. & B. 172.

⁶ Barker v. Janson, L. R., 3 C. P. 303. *S. P.* Lidgett v. Secretan, L. R., 6 C. P. 616; Marshall v. Parker, 2 Camp. 69.

the valuation agreed upon is binding.”¹ So Lord Mansfield, after stating that upon valued policies “the merchant need only prove some interest to take it out of the 19 Geo. 2, because the adverse party has admitted the value,” &c., adds: “If, indeed, it should come out in proof, that a man had insured 2000*l.*, and had interest on board to the value of a cable only, there never has been, and, I believe, never will be, a determination that, by such an evasion, the Act of Parliament may be defeated.”²

Haigh v.
De la Cour.

Accordingly, where clear evidence was given that the goods had been fraudulently over-valued, with intent to cheat the underwriters, Sir J. Mansfield would not allow the assured to recover even for the value actually proved to be on board; but the evidence of fraud in this case was very conclusive; the actual value on board was only 1400*l.*; the valuation in the policy was 5000*l.*; the invoices were proved to be fictitious, and the bills of lading to have been interpolated, after they were signed by the captain; the ship was run away with, and carried to the West Indies (having been insured for Pernambuco), and the goods there disposed of by a person whom the assured had put on board as a supercargo.³

The result.

The rule, therefore, is, that under a valued policy the assured upon traverse of interest must prove that he had, in fact, some insurable interest in the subject insured; but he need never prove the value of such interest, unless the circumstances and the defence raise a question of fraud.⁴ By fraud, however, or by excessive over-valuation material to be disclosed but in fact concealed, the contract itself is vitiated; and in either case nothing at all can be recovered.⁵

¹ *Barker v. Janson*, L. R., 3 C. P. 319.
303.

² *Lewis v. Rucker*, 2 Burr. 1167, 1171. The law is the same in the United States; *Miner v. Tagart*, 3 Binney, 305; 2 Phillips, no. 1182.

³ *Haigh v. De la Cour*, 3 Camp.

⁴ Per Sir J. Mansfield, in *Feise v. Aguilar*, 3 Taunt. 506.

⁵ *Haigh v. De la Cour*, *supra*; *Ionides v. Pender*, L. R., 9 Q. B. 531; see *Rivaz v. Gerussi*, 6 Q. B. D. 222.

In fixing the valuation of goods Lord Ellenborough says, Valuing goods for profits. "the assured may add to the first cost the premium and commission, and, if he sees fit, the probable profit;"¹ or, as he elsewhere puts it, "he may stipulate that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery."² The learned judge thus distinctly admits that the assured may value his goods in the policy so as greatly to exceed the invoice price, in order to cover the expected profit. And, indeed, as Mr. Stevens remarks, this is the real advantage that valued policies on goods hold out to the merchant.³

Mr. Benecke, agreeably to the principles already pointed Mode proposed by Mr. Benecke. out, shows how, by means of a valued policy, the merchant may cover, not only the profit he expects to make on his goods at the port of delivery, but also, in case of their arriving there in bulk and sea-damaged, may protect himself against the loss to which he would otherwise be exposed, from having to pay full duty, freight, and landing charges. Thus, supposing the sum required to be insured on the goods themselves (*i. e.*, so as to cover their prime cost, premiums of insurance, and commission) to be 2000*l.*; freight payable on their arrival, 200*l.*; expected profit, 400*l.*; duty and landing charges at the port of delivery, 100*l.* (the full duty and freight being payable on damaged goods arriving in bulk): then 2700*l.* would be the sum required to be insured altogether. The plan recommended by Mr. Benecke is, to value at 2700*l.* and add this clause:—"Of these 2700*l.*, 2000*l.* are on the goods, 200*l.* on freight, 400*l.* on expected profit, 100*l.* on duty and landing charges."⁴

This clause, though unobjectionable, appears unnecessary in English policies, where, according to the liberal practice that prevails in the business of insurance, it seems very

¹ *Forbes v. Aspinall*, 13 East, 323, 327.

² *Usher v. Noble*, 12 East, 639, 647.

³ *Stevens on Average*, 179.

⁴ *Benecke, Pr. of Indem.*, pp. 24, 29.

unlikely that any attempt would be made to set aside a valuation which was *bonâ fide*, and only intended to procure for the assured a complete indemnity in case of loss.

In France.

In France the rule, under the Code de Commerce¹ (as formerly under the Ordonnance de la Marine²), is, that the valuation may be set aside in case of fraud.

The French jurists have distinguished two classes of fraud: fraud in fact (*dolus re ipsâ*), and fraud in intent (*dolus malus*); and they seem to think that any considerable and palpable over-valuation of the subject insured, as where goods worth only 8000 francs are insured for 10,000, though made without any actual intent to deceive on the part of the assured, would yet be such fraud in fact as to entitle the underwriter to set aside the valuation; except, indeed, where both parties have agreed to be bound by it.³ Valin thinks that, in the absence of such agreement, an over-valuation to the extent of a fourth; a third, or, at all events, a half, would be sufficient to open the policy;⁴ but Emerigon, and, after him, Boulay-Paty, considers that it is better to leave the question to the decision of the tribunal before which the particular case is tried, without attempting to fix the exact amount of excess that shall open the policy.⁵

Elsewhere.

Mr. Benecke, with his usual laborious comprehensiveness of research, has examined into the law and practice of Holland, Hamburg, Prussia, Sweden, Denmark, Italy, and Spain, with regard to the effect of a valuation in the policy. The general result appears to be, that the valuation is conclusive upon the parties to the policy, unless it is excessive or fraudulent.⁶

¹ Art. 357.

² Liv. c. t. 6, art. 8.

³ See 2 Valin, p. 52, Comment on art. 8, liv. 3, t. 6; Pothier, des Ass., no. 156, 157, ed. Estrangin, pp. 242—244; 1 Emerigon, c. ix. s. 5, pp. 277—282; 2 Delvincourt, de Droit Comm. 345, 346. Boulay-Paty, Droit Maritime, vol. iii. 398—401, is of the same opinion, contrary to the repre-

sentation of Mr. Ch. Kent, Com. vol. iii. p. 273, note.

⁴ Valin, *loco citato supra*.

⁵ 3 Boulay-Paty, 401.

⁶ Benecke, Pr. of Indem. 149—152. Mr. Nolte, in his valuable edition, gives the references to all the more recent ordinances—the effect being precisely as stated in the text; 1 Nolte's Benecke, 849—855.

But without infringing on the integrity of this rule as to the conclusiveness of a valuation expressed in the instrument, there are two questions that may be raised, capable each of affecting the amount recoverable on a valued policy.

The first of these questions is as to what it is that was valued. For instance, if something has formed a constituent in the estimate of value in which the assured had no insurable interest—*e. g.*, if freight, paid in advance, were included in the valuation expressed in a policy on freight effected for the shipowner,—it is clear that the underwriter, to the extent of this element of the value, would not be liable; and whether it was so or not, ought to be known and also may be investigated without infringing on the absolute nature of a valued policy.¹

The second of these questions which may be raised under a valued policy is, whether in fact the whole interest valued has been at risk.

Whether the whole of the interest has been at risk.

“The valuation,” says Lord Ellenborough, “in case of goods, looks to all the goods intended to be loaded; and in case of freight, it looks to the freight upon all the goods the ship is intended to carry on the voyage insured: and if, by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so, if, by the perils insured against, the freight of part only of the goods to be carried be lost, the assured can only recover, in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation.”²

Accordingly, in the case from which these remarks are taken, insurance having been made on freight “at and from Hayti to Liverpool,” valued at 6500*l.*, and it appearing that

Forbes v. Aspinall.

¹ Williams v. North China Ins. Co.,
1 C. P. Div. 757.

327. See the judgment of Blackburn, J., in Tobin v. Harford, 33 L. J., (C. P.) 37.

² In Forbes v. Aspinall, 13 East,

the vessel was lost off the coast of Hayti, when she had only taken in fifty-five bales of cotton, forming but a small part of the cargo to be shipped on board, on which the freight was valued, the Court would not allow the assured to recover the whole amount of the valuation, but only such a proportion of it as the goods actually shipped on board bore to the full cargo to be loaded and taken into account in estimating the freight.¹

Rickman v.
Carstairs.

In the case of a policy on homeward cargo, it appeared that at the time of the loss, which was total, only a portion of the homeward cargo was on board, but not of a value equal to the valuation in the policy, although enough of the outward cargo still remained on board to make up that amount. The Court, holding that the outward cargo was not covered by the policy, and proceeding on the principle that the underwriter is only bound by the valuation when the whole of the intended cargo is on board, were of opinion that the cargo referred to in the valuation must, on the true construction of the policy, be taken to be a full homeward cargo, and that the assured was entitled to recover, not the whole amount of the insurance, but such proportion only of it as the value of the homeward cargo on board at the time of the loss bore to a full homeward cargo.²

Tobin v.
Harford.

Under a time policy on ship valued at 2000*l.*, and on cargo valued at 8000*l.*, containing all the clauses proper to the barter trade on the coast of Africa, outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade, the ship reached Kinsembo with a cargo on board worth 6226*l.*, of which part was there discharged to the value of 3952*l.*, and then without loading other cargo, after being more than twenty-four hours at Kinsembo, sailed for Congo with the residue, and was lost on the way. The assured claimed 8000*l.* in respect of the "cargo," interpreting that word in the policy as signifying any goods on board at the time of the loss. The

¹ Forbes v. Aspinall, 13 East, 323.

² Rickman v. Carstairs, 5 B. & Ad. 651.

Court, however, held that the valuation in the policy was of a substantially full cargo, and that the plaintiff could only recover, as for an average loss, an aliquot part of that sum, corresponding to the proportion which the goods on board bore to a full cargo.¹

Under a policy "upon chartered freight, valued at 7000*l.*, at and from Sydney to Calcutta and London," the remainder of the voyage was abandoned at Calcutta on account of the bankruptcy of the charterers, and the vessel took 360 coolies and part cargo of rice for the Mauritius. Thereupon the voyage described in the policy was altered by indorsement, and it was further indorsed as follows:—"The within interest is now declared to be on freight valued at 2000*l.*" The subscription of 1000*l.* by the defendants remained unaltered. When near the Mauritius the vessel was wrecked; there was a total loss of the rice and of the freight of it; the greater part of the coolies were saved, and their passage-money, but some were lost, and with them their passage-money. The question was what under this policy in these circumstances the assured was entitled to recover.

Denoon v.
Home and
Colonial Ass.
Co.

The defendants contended that the word *freight* covered the passage-money, and, consequently, that the proportion would be, as the gross sum of the freight and passage-money originally on board was to the amount underwritten so was the gross sum of the freight and passage-money lost to the sum to be recovered. It was held, however, that in the absence of any usage in insurance law to designate passage-money as freight, and in view of the context in the policy, providing that "the insurance aforesaid shall commence upon the freight and goods or merchandise from the loading of the said goods," &c., the word *freight* in the policy did not cover the passage-money. It was further held, that inasmuch as there was not a full cargo on board or any estimation in the policy of what the freight of a full cargo would have

¹ *Tobin v. Harford*, 32 L. J. (C. P.) 13 C. B., N. S. 791; 17 C. B., N. S. 134; (in error) 34 L. J. (C. P.) 37; 528.

been, the policy must be dealt with as an open policy, and, consequently, that the assured was entitled to recover in the proportion of 1000% to 2000%, or one-half of the whole freight on board, not exceeding 1000%, that is, one-half of 1412%, being in fact 706%.¹

In the United States.

These principles have received abundant illustration in the Courts of the United States. Thus, where seventy-four mules were insured, valued at 11,000 dollars, and only thirty-five mules were actually shipped, the assured, in case of loss, was only allowed to recover thirty-five 74th parts of 11,000 dollars.²

Practical difficulties in applying this rule.

As to the rule thus well established, there is yet in many cases a difficulty about its practical application, arising out of the question, "what is a cargo, sufficient to entitle the jury to say, that that has been shipped to which the valuation in the policy refers?"³

In case of average loss.

A difficulty was also at one time felt as to the principle upon which the amount of loss should be adjusted, but the following satisfactory solution of it, suggested in the argument in *Rickman v. Carstairs*, has since been accepted and sanctioned with the approval of the Court of Common Pleas and of Exchequer Chamber.⁴ The passage is this:—"Even supposing the policy to be opened, the valuation will not be altogether inoperative; for it will prevent any dispute as to the value of the whole contemplated cargo. Thus, if a valued policy on sugar be opened, on the ground of only four-fifths of the intended cargo having been shipped and lost, the underwriter will pay, not a value to be now put on the lost sugar, but four-fifths of the sum underwritten."⁵

¹ *Denoon v. Home and Colonial Ass. Co.*, L. R., 7 C. P. 341.

² *Brook v. Louisiana Insurance Co.*,

⁴ *Martin's New Series*, 640, 681; 2 *Phillips*, no. 1196, and other cases there cited.

³ *Per Parke, J.*, in 5 B. & Ad. 660;

and see the judgment, per *Blackburn, J.*, in *Tobin v. Harford*, 34 L. J. (C. P.) 37.

⁴ *Tobin v. Harford*, 32 L. J. (C. P.) 134, 136; 13 C. B., N. S. 791; (in error) 34 L. J. (C. P.) 37.

⁵ 5 B. & Ad. 662.

In cases of total loss under valued policies on ship, the value in the policy is never employed as a standard of comparison with the estimated expense rendered necessary by the perils insured against, in order to ascertain whether the case is one of constructive total loss. The sole question, *e. g.* that determines whether a ship is so damaged as to entitle the assured to recover as for a total loss, upon giving due notice of abandonment, is not, whether the cost of repairs will exceed the value in the policy, but whether the cost of repairs will exceed the ship's value when repaired. "When this test has been applied, and the nature of the loss thus determined, the quantum of compensation is then to be fixed. In an open policy, the compensation must then be ascertained by evidence. In a valued policy, the agreed total value is conclusive; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss."¹

In determining whether there be a constructive total loss.

As a general rule, the valuation is conclusive between the parties to the same policy only.

Valuation conclusive between the parties to the same policy.

If the assured has protected his interest in the subject of insurance on the same risk by more than one valued policy, fixing a different valuation in each on the interest insured, the valuation in one policy sets no limit to the sum he may recover on the other.² But the sum recovered on the one does go in reduction of the amount recoverable on the other.³

One consequence of this in connection with the above general rule is, that the whole sum recovered under all the policies will be less or greater according as recovery is had in the first instance under policies of the greater or the lesser valuation. Thus, if a ship be valued in one policy at 8000*l.*,

Right to recover under more than one valued policy.

¹ Opinion of the Judges in the House of Lords in *Irving v. Manning*, 6 C. B. 422, supporting the previous decisions of *Cambridge v. Anderton*, 2 B. & Cr. 691; *Allen v. Sugrue*, 8 B. & Cr. 561; *Young v. Turing*, 2

Mann. & Gr. 593; *Manning v. Irving*, 1 C. B. Rep. 168.

² *Bousfield v. Barnes*, 4 Camp. 227.

³ *Bruce v. Jones*, 1 H. & C. 769; 32 L. J. (Ex.) 132.

and 6000*l.* is recovered under it, and valued in another at 4000*l.*, which is the last to be put in suit, nothing is recoverable under the second. As between assured and underwriter under this latter policy, 4000*l.* is the value of the ship; but treating the sums recovered under other policies as salvage, it appears thereby that the assured according to the agreed valuation has at least not sustained a loss.¹ It is a mere corollary to this that where the valuation is the same in both policies, the assured is bound by that sum, and cannot recover beyond it.²

Valued policies on different risks.

If the valued policies though upon the same interest were on different risks, the rule above considered does not apply; and consequently the same insurer has been held liable for successive losses occurring on different risks to the full amount recoverable on each policy, notwithstanding that the second was a total loss occurring before a partial loss on a prior risk had been repaired.³

Insurer's rights.

The valuation in the policy, regarded as a conclusive contract between the parties, may have the effect of subrogating the insurers to more extensive rights than are intended to be conveyed to them by the assured on effecting the policy. A vessel that was insured to the amount of 6000*l.*, and valued in the policy at the same amount, was run down at sea by another ship and totally lost. The insurers paid the owners the full sum of 6000*l.*, and then claimed to be entitled to the whole of the money recovered in the Admiralty Court against the surviving vessel, viz., 5495*l.* The owners of the lost ship, however, claimed a share of the sum recovered, on the ground that their vessel, though valued in the policy at 6000*l.*, was really worth 9000*l.* But it was held, that the owners were bound by the valuation in the policy, and that the insurers having paid them in full upon

¹ *Bruce v. Jones*, 1 H. & C. 769, overruling *Bousfield v. Barnes*, 4 Camp. 227.

² *Irving v. Richardson*, 1 Mood. &

R. 153; and see *Morgan v. Price*, 4 Exch. Rep. 615.

³ *Lidgett v. Secretan*, L. R., 6 C. P. 616.

the footing of that estimate, were subrogated to the rights of the owners against the wrongdoer.¹ This decision has since been doubted. Lord Blackburn says in respect of it, "I own if I had a similar case to decide, sitting in the Court of Error, I should pause before I said that it was rightly decided."²

The presumption is that the valuation in the policy is, not the whole estimated value of the subject of insurance, but merely of the interest of the assured therein. Hence, where insurance was made on goods "valued at 19,000*l*," of which the assured owned four-ninths, it was contended that the valuation was intended for the entire property, and, accordingly, that the interest of the assured was to be taken as four-ninths of that sum; but the Court said, "We must take it that the value insured is the value of the assured's interest."³

The valuation is of the assured's interest.

From the difficulty of proving the insurable value of the ship in case of loss, policies on ship are more commonly valued. The value is usually determined in this country by estimating the ship's worth to her owner at the outset of the risk, including stores, outfit, and money advanced for seamen's wages—the whole covered with premiums and commissions.⁴ The valuation calculated in this way determines the amount recoverable, how great soever may have been the wear and tear of the ship and consumption of her stores and provisions at the time of loss, and notwithstanding the loss be near the close of a long voyage.⁵

Valued policies on ship, and on ship and freight.

Besides, it is usually the practice in this country to value the freight by a separate policy at its gross amount, and that amount becomes recoverable, notwithstanding the expenses

¹ North of England Iron St. Ship Ins. Assoc. v. Armstrong, L. R., 5 Q. B. 244.

² Burnand v. Rodocanachi, 7 App. Cas. 333, 342.

³ Feise v. Aguilar, 3 Taunt. 506.

So, in respect of freight, Allison v. Bristol Marine Ins. Co., 1 App. Cas. 209.

⁴ Stevens on Average, 190.

⁵ Shawe v. Felton, 2 East, 109.

that would have been necessary to the earning of it have been prevented by the loss. By means of two such policies it is clear that in case of loss the shipowner receives far more than an indemnity.

For example, suppose a ship chartered for a four months' voyage, to be worth to her owner, in the port of loading, including rigging, &c., 2000*l.*; provisions, 80*l.* more; petty expenses at port of loading, 18*l.* additional; seamen's wages, paid in advance to the extent of one-half, 75*l.*; making altogether, 2173*l.*; add a premium on this sum at 3 per cent. and premium on premium, viz., 67*l.* 4*s.*, and the sum which the assured would be entitled to receive on the policy on ship in case of a total loss is 2240*l.* 4*s.*

So much for the policy on ship; but now as to the freight. Suppose the gross freight for the whole voyage, without deducting the expenses of earning it, to be 650*l.*; premium at 3 per cent., &c., 20*l.* 2*s.*, making together 670*l.* 2*s.*, which is the amount recoverable for freight, calculated according to the principle observed in this country in respect of open policies. Therefore the amount recoverable in respect of ship and freight under the two policies is 2910*l.* 6*s.*

In order to show how much this exceeds an indemnity, let us see what the shipowner would net in case the ship arrived and full freight was earned. Taking the wear and tear of the ship for the four months' voyage, at the moderate sum of 100*l.*, the ship would be worth to her owner on arrival (2000*l.* - 100*l.*) 1900*l.*

Then as to freight, taking the expenses at the port of destination to be 25*l.*, and the seamen's wages for the last two months to be 75*l.*, these two items payable out of the gross freight of 650*l.* would reduce the net amount of freight to 550*l.* The sum, therefore, that the shipowner would net by the ship's safe arrival earning freight would be, for the ship, 1900*l.*; for the freight, 550*l.*; making the total net value of the ship and freight to the owner on safe arrival, 2450*l.* But in case of total loss he would receive 2910*l.* 6*s.*, *i. e.*, he would be a gainer by the total loss of his ship and freight

to the extent of 460*l.* 6*s.*,¹—"a great inducement indeed to many," as Mr. Benecke exclaims, "to convert a partial into a total loss!"²

In the United States the practice not unfrequently prevails of valuing freight for the purposes of insurance at two-thirds of the gross amount, calculating this as about the sum which the shipowner on the average receives as net freight.³ But freight, as well as other subjects, may be valued even above its gross amount: and in one case in the United States the Court are reported to have said, "The parties agree that the freight shall be valued at a sum which eventually proves to be three times the value of the carriage of the goods: but we do not perceive that the estimate was made unfairly;" and it was adjudged that the underwriters should pay a loss according to the valuation.⁴

In the United States.

The following question has arisen, and been a good deal discussed in the Courts of the United States:—Suppose a policy to be on time, or on a voyage having intermediate stages, at each of which freight is earned and becomes due, independently of the circumstance of the vessel's arriving at subsequent stages,—and that there is but one valuation in the policy,—is this valuation to be applied to the aggregate amount of all the freights, or to the amount of each severally?

Where the voyage is made up of distinct stages, and there is but one value.

Mr. Phillips, after a learned examination of the authorities, states the result to be "in favour of such valuation being applied to the freight successively pending on the separate passages, and not to the aggregate freight for all the

¹ A seaman's wages, in case of wreck or loss of ship, are now payable for the full time of service prior thereto, unless barred by proof that he has not exerted himself to the utmost to save ship, &c.: 17 & 18 Vict. c. 104, ss. 183, 185: the difference, therefore, would be less or more than the estimate in the text, according as the loss happens before or after the middle point of the voyage,

the point necessarily assumed in the present state of the law for the purpose of the above estimate.

² Principles of Indem., c. ii., "As to Insurances on Ships," from which the whole of the above calculations are taken.

³ 2 Phillips, no. 1204.

⁴ Coolidge v. Gloucester Marine Ins. Co., 15 Mass. Rep. 341, cited 2 Phillips, no. 1267.

passages.¹ He concludes that the doctrine applicable to the subject is, that "a valuation of freight in a time policy, or one for successive passages, is presumed to be of that successively pending;" but this presumption, he thinks, may be rebutted, by showing that the valuation is applicable to the aggregate amount of the successive freights.²

If there is any provision in the charter-party suspending the earning of freight till the completion of the homeward passage (as was frequently the case with ships chartered for the voyage out and home in the East India Company's trade), and the freight for the whole voyage be valued at a gross sum, it seems that the whole sum valued may be recovered whether the loss take place on the passage out or home.³

Valued policies on goods.

Valued policies on goods are stated by Mr. Stevens to have originated in insurances on colonial produce, of which, as no invoice could be had (no purchase having been made), a valuation was necessarily adopted such as would indemnify the planter in case of loss. The practice being found very convenient, on account of its enabling the merchant to include in the valuation a fair mercantile profit on his goods, which he could not do by an open policy, was extended to classes of goods as to which the original reasons for its adoption did not exist.

Specific valuations.

A cargo of different kinds of produce, as sugars, coffees, tobacco, &c., is more usually and, for adjustment, more conveniently valued as to each kind of produce separately; as "on sugars valued at 500*l.*, on coffee valued at," &c., or "on 100 hogsheads of sugar valued at," &c. Sometimes the valuation is at so much per hogshead, tierce, barrel, bale, cwt., lb., &c. This is followed in most instances with appropriate clauses, "to pay average on each species, as if separate interests, separately insured," or "to pay average on each 10, 15, 20 hogsheads, &c., succeeding numbers, as if separately

¹ 2 Phillips, Ins. no. 1208.

& Ad. 478, *post*, p. 324.

² See an analogous application of principle in *Crowley v. Cohen*, 3 B.

³ *Williams v. London Ass. Co.*, 1 M. & Sel. 318.

insured.”¹ We shall see hereafter that the purpose of these specific insurances is in case of a partial loss to enable the assured to recover notwithstanding the memorandum clauses, and that the single word “effects,”² or “goods,”³ describing the subjects of insurance, does not prevent the policy being construed distributively, when such word is descriptive of various kinds of goods or articles.⁴ It is quite otherwise if such word be descriptive of a homogeneous cargo only, such as linseed⁵ or rice,⁶ notwithstanding it is packed in separate bags or packages; and the effect of such a policy is not altered by indorsement afterwards of a declaration of the ship, and of the packages and their separate value.⁷

When goods are valued at so much per lb., this must be understood of the lb. of the place where the policy is made.⁸

When the assured expects goods from abroad, but does not know the kind or the amount, he generally procures the policy to be effected “on goods to be thereafter declared and valued.”

Although such declaration before loss is not a condition precedent to the right of the assured to recover, yet if the value be not declared till after the loss, the policy will be regarded as an open policy.⁹

Under a policy in this form, a clerk of the assured wrote out and signed a declaration of interest and value on a separate piece of paper, which he wafered to the policy, but it did not appear that this had been shown to the underwriter before the loss was known, and Lord Ellenborough held there was no declaration, and consequently that it was an open policy.¹⁰

¹ Stevens on Average, 186, 224, 225; Benecke, Pr. of Indem. 158, 159.

² Duff v. Mackenzie, 3 C. B., N. S. 16; 26 L. J. (C. P.) 313.

³ Wilkinson v. Hyde, 3 C. B., N. S. 30; 27 L. J. (C. P.) 116.

⁴ Cator v. Great Western Ins. Co. of New York, L. R., 8 C. P. 552.

⁵ Ralli v. Janson, 6 E. & B. 482; 25 L. J. (Q. B.) 300.

⁶ Entwistle v. Ellis, 2 H. & N. 549; 27 L. J. (Ex.) 105.

⁷ Ibid.

⁸ Stevens on Average, 186; 2 Phillips, no. 1199.

⁹ Craufurd v. Hunter, 8 T. R. 13, 15 n.

¹⁰ Harman v. Kingston, 3 Camp. 150; per Mellor, J., “It may be important that both parties should know

Goods “to be thereafter declared and valued,”

and are not valued.

In the same case Lord Ellenborough doubted at first whether a declaration of interest before loss were not a condition precedent to the policy attaching; he however ultimately held that it was not,—that the policy attached notwithstanding, and that the claimant's right to recover depended on his proof of interest. This doctrine has since been followed as law by the Court of Queen's Bench.¹ As we have seen elsewhere, a mistake made in declaring may be corrected without the assent of the underwriters if made without fraud and without prejudice to their interest.²

Applied to
the proceeds
or returns of
the outward
cargo.

Questions have arisen in the United States whether a valuation in a policy on goods for the voyage out and home applies to the proceeds or returns purchased by the sale of the outward cargo. This is a question of intention, and consequently to be determined upon a construction of the instrument in view of the circumstances of the case. "In the absence of any collateral considerations," says Mr. Phillips, "I conclude the preferable doctrine to be, that a valuation of the outward cargo in a policy for the round voyage is to be presumed to be a valuation of its whole proceeds for the return voyage or for subsequent passages."³

Premium.

Generally speaking, a valuation at a round sum is taken to include the premium, and this whether the valuation be on the subject in gross, or by the weight, measure, or piece, except where the contrary appears from the language of the policy, or from the scale of the valuation.⁴

as to value; but the risk is quite a different question:" Cockburn, C. J., "There must be an agreement as to valuation;" *Gledstanes v. Royal Exch. Ass. Co.*, 34 L. J. (Q. B.) 30, 34.

¹ *Gledstanes v. Roy. Exch. Ass. Co.*, 34 L. J. (Q. B.) 30.

² *Robinson v. Touray*, 3 Camp. 158.

³ See *McKim v. Phoenix Ins. Co.*, 2 Washington Circ. Court Rep. 89;

Haven v. Gray, 12 Massachusetts Rep. 71; *Whitney v. American Ins. Co.*, 3 Cowen, 210, and 712; 2 Phillips, nos. 1197, 1198.

⁴ This is the received doctrine in the United States; 2 Phillips, no. 1201. The learned author cites *Mayo v. Maine Fire and Marine Ins. Co.*, 12 Mass. R. 259, where the Court concluded, from the scale of valuation merely, that the premium was not intended by the assured to be included.

Where goods are expected from abroad, and no value is put upon them in the policy, but it is stipulated that the coin of the foreign port of loading at which they are invoiced shall be reduced into our own money, at so many shillings the dollar, livre, rupee, &c.; this, it seems, ought not to be taken as a valued, but as an open policy; for it contains no fixed valuation of the goods, but only an ascertainment of the value in our money of the foreign currency in which their invoice value is expressed. Accordingly, it has been held in America, that the invoice value, thus calculated, must have the premium added to it, in order to ascertain the insurable value, just as in an open policy.¹

Stipulated rate of exchange does not make a valued policy.

If a cargo of various kinds of produce is not valued in parts according to the kind, but in the lump at one gross sum, this, although unusual and objectionable, will not, as it seems, in case of partial loss, be set aside, unless it be impossible to ascertain, by the invoice or otherwise, in what way the valuation was intended to be apportioned on different parts of the cargo.² The proportional prime cost of the different kinds of goods having been ascertained by the invoice, the valuation should be applied to each kind in the same proportion; and the percentage of damage sustained by any one kind of goods be applied to this proportion of the value, in order to ascertain the amount due thereon from the underwriter.³

One gross sum to cover varieties of cargo.

An open policy is one in which there is no valuation of the interest at risk, but the interest remains to be estimated

Of open policies.

¹ *Ogden v. Columbian Ins. Co.*, 10 Johns. R. 273; and see *Mayo v. Maine Fire & Mar. Ins. Co.*, 12 Mass. R. 259, cited 2 Phillips, Ins. no. 1201. Mr. Benecke thinks otherwise, *Pr. of Indem.* 159; but the rule in the text seems preferable.

² *Stevens on Average*, 185, 186. In one case in the United States the Judges were equally divided in opinion

whether a valuation in the lump on ship, cargo, and freight in one policy, without specifying how much on each, was not void for uncertainty; *Stocker v. Harris*, 3 Mass. R. 409; 2 Phillips, no. 1203.

³ See a similar rule followed in applying specific rates of freight to other cargo than the articles specified; *Warren v. Peabody*, 8 C. B. 800.

according to a certain rule upon the evidence of facts in each case.

Estimation of interest.

As we have already seen, the value of the insurable interest under open policies is taken to be the amount which measures its worth to the assured at the commencement of the risk, plus the expense of the insurance. The indemnity contemplated by this mode of estimation, puts the assured as nearly as possible in the same position as he was in at the outset of the adventure, before effecting the insurance; taking no account, however, of the profit he missed making or of the wear and tear which his property actually sustained.

If the expense therefore of effecting the insurance, and the premium paid upon it, and the premium upon the premiums down to the total extinction of the risk, did not enter into the calculation, the indemnity would not be real and complete.

For example, suppose goods, the invoice price of which, together with shipping charges, amounts to 1000*l.*, to be insured at 5 per cent.; it is plain that the merchant, by insuring 1050*l.*, is not fully covered; for the premium for insuring 1050*l.* at 5 per cent. will be 52*l.* 10*s.*, and the whole sum at risk would thus be 1052*l.* 10*s.*, while all that could be recovered, in case of a total loss upon the above supposition, would be 1050*l.*; it is plain, therefore, that the assured, who wishes to be completely protected from loss, must go further, and insure the premium of the premiums, down to the extinction of the risk.

Practical rule.

The simplest practical rule for ascertaining the sum necessary for this purpose is as follows:—the premium being contained in the sum which the underwriter pays, the assured for his indemnification can only receive that sum, deducting the premium; hence, every 100*l.* meant to be insured, must be so insured minus the premium. As this residue is to 100*l.* so is the amount of interest intended to be insured to the sum required to be insured in order fully to protect it. Thus, suppose the amount of interest to be insured (no matter

whether in ship, freight, or goods, for the rule now under consideration extends to all alike) to be 1000%, and the premium to be 5*l.* 5*s.* per cent. Then 100% minus 5*l.* 5*s.* is equal to 94*l.* 15*s.*; and as 94*l.* 15*s.* is to 100% so will 1000% be to the sum required to be insured, in order completely to cover the interest at risk, or about 1055%.¹

Besides the premium and premiums of premium, it is requisite to cover the expenses of the policy; *i. e.*, the stamp duty, and the broker's commission, if effected by a broker. We have therefore, as before, on 100%, premium 5*l.* 5*s.*, stamp duty, say 6*d.* (in case of a policy for twelve months), and the broker's commission $\frac{1}{2}$ per cent.; *i. e.*, 5*l.* 15*s.* 6*d.* is to be deducted from the 100%, and the proportion is, as 94*l.* 4*s.* 6*d.* : 100% :: 1000% to the sum required to be insured, that is, 1062%.

In some cases it is stipulated in the policy that the charges of recovery in case of loss shall also be covered by the policy. These charges, when the policy is effected by a mercantile agent in this country for a foreign correspondent, through the medium of a broker, are $\frac{1}{2}$ per cent. brokerage, and 2 per cent. agent's commission, making a sum of 2*l.* 10*s.* to be deducted from every 100% proposed to be insured, when it is desired to find a sum that will cover the charges as well as the subject of insurance. It makes no difference if there be a stipulation for a return of premium on a certain contingency, as for convoy or safe arrival, the whole premium is, nevertheless, to be added in estimating the amount of the interest.

Formerly underwriters in this country generally reserved an abatement of one or two per cent. on payment of all losses; but as the only practical effect of this was to make the assured, who wished completely to cover his interests by the policy, add the same percentage to the nominal rate of premium, this provision became useless, and does not occur in the common printed forms of policy in this country.

¹ Stevens on Average, 193; Benecke, Pr. of Indem. 119, 120.

Adjustment
of total or
partial loss.

In case of total loss, the assured under an open policy is entitled to recover up to the full extent of the value thus calculated, supposing the sum insured to amount to so much. In cases of partial loss the percentage of damage done to the subject insured being first ascertained, the assured is entitled to recover the same percentage of the insurable value calculated as above.

Of course the underwriter is only liable in respect of the particular sum insured by himself, to pay the whole or a proportion, as the case may be. Thus, if an underwriter has insured 200*l.* on an open policy on goods, the estimated insurable value of which is 1000*l.*, and the ascertained amount of sea damage 10*l.* per cent. on what they would have fetched at the port of delivery had they arrived there sound, the underwriter pays as his share of the indemnification 10*l.* per cent. on the sum he has insured, *i.e.*, 20*l.* In the same way, in case of total loss, he would have paid 200*l.* If the aggregate of the sums insured equals the whole amount of insurable value, the assured receives 10*l.* per cent. on 1000*l.*, *i.e.*, 100*l.*; if it is less than this, he is his own insurer for the part uncovered by the policy; if more, it is an over-insurance.

Proof of interest at risk.

The mode of proving the amount of insurable interest under an open policy in case of loss is;—for the goods, by the production of the invoice, bill of lading, policy, &c.;—for the ship, by the production of reports and estimates of surveyors, bill of sale, &c.;—for the freight, by the production of the freight manifest, &c.

Insurable
value of ship.

With regard to the ship, her insurable value in an open policy is what she is worth to her owner at the port where the voyage commences, including stores, provisions, outfit, and money advanced for seamen's wages, the whole covered with the premium of insurance and premium on premium, together with the stamp duty and commission for effecting

the policy, adding, if required and stipulated for, the charges of recovery in case of loss.¹

The insurable value of freight, in open policies, is the sum payable to the shipowner for freight, together with the premiums of insurance and commissions, without deducting the expenses of earning the freight;—*i.e.*, the gross and not the net freight, *plus* premiums and commissions, is the insurable value.²

Insurable
value of
freight.

With regard to goods, the long-established rule in this country is, that their value for the purposes of insurance, when not fixed by the policy, is the amount of the prime cost, together with the charges of shipping them on board, stamp duty, and broker's commission for effecting the policy, the whole covered with the premium, and insurance on the premium.³

Insurable
value of
goods.

In stating that the prime cost of the goods is to be taken as the basis of their insurable value, we give the rule as it is universally acted upon in this country. The prime cost is generally evidenced by the invoice price, but is not conclusively fixed by it.⁴ In the United States it has been laid down on several occasions, that the market price of the goods at the commencement of the risk, is the true basis of calculation, and that the prime cost or invoice price furnishes no satisfactory rule of indemnity in any case where it exceeds, or is less than the market value. "Suppose," says Washington, J., "the property to be destroyed within an hour after the risk has commenced, what is it the owner

¹ Stevens on Average, 190.

² See per Lord Ellenborough, *Forbes v. Aspinall*, 13 East, 323, 326; *Palmer v. Blackburn*, 1 Bing. 61; Stevens on Average, 192. The same rule appears most generally to obtain in the United States; though in some of the States the insurable value of freight is taken to be two-

thirds of its gross amount; see 2 Phillips, no. 1238, note.

³ *Usher v. Noble*, 12 East, 646; *Tuite v. Royal Exch. Co.*, 1 Park. Ins. 224, 225, 8th ed.; Stevens on Average, 178 et seq.; Benecke, Pr. of Indem. 12-14; Phillips, vol. ii. c. 14, s. 2.

⁴ 2 Phillips, no. 1229.

loses? Precisely as much as it is worth, or would have commanded in the market at the time and place of shipment. If the property cost him less than it was worth when shipped he loses (in case of total loss) as well the first cost as the increased value for which he is entitled to claim indemnity from the insurer."¹ In theory this is unquestionably true, but as a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard.²

Invoice price
in foreign
money.

When the invoice price of goods shipped from a foreign port where there is no current rate of exchange is expressed in the currency of the foreign country to which such port belongs, the true mode of ascertaining the insurable value is to estimate what would be the worth of the foreign money in which the invoice price is expressed, supposing that it had been shipped in specie, instead of the goods, to the port of destination: *i. e.*, the invoice value of the goods is to be ascertained by calculating what the foreign coin in which it is expressed would be worth to the consignee of the goods, after paying the premium of its insurance, the freight and other expense of its transportation.³ On the other hand, if there is a current rate of exchange at the foreign port of loading, the most equitable measure of the insurable value of the goods appears to be the invoice price taken at the rate of the exchange there at the commencement of the risk.⁴

Lord Kenyon, however, acted upon a different rule in the case of a policy effected in September, 1791, on sugar shipped from a French port. At the time of effecting the policy, the exchange in England, on the French crown of

¹ See 2 Phillips, no. 1229, citing *Carson v. Marine Ins. Co.*, 2 Wash. C. C. Rep. 468. In one case, the invoice price was taken, though higher than the actual cost to the assured; see *ibid.*; *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. R. 436.

² In France the rule is to take the invoice price as the basis, where it

can be made out by the production of the proper documents; where not, then the price current at the time and place of loading; *Code de Comm.* art. 339.

³ See *Magens on Ins.*, vol. i. p. 41, s. 40; *Benecke, Pr. of Indem.* 119.

⁴ 2 Phillips, *Ins.* no. 1231.

3 livres, was 24*d.*; at the time of settling the loss, in January 1792, it had fallen to 7 $\frac{3}{4}$ *d.*: Lord Kenyon held, that as, in case the exchange had risen, the assured would have had the benefit of the rise, so, in case of a fall, they must submit to the loss; and he decided, that the insurable value of the sugars must be estimated, and the loss paid upon the rate of exchange at the time of the adjustment, *i.e.*, at 7 $\frac{3}{4}$ *d.* the French crown.¹

If the goods are purchased by barter in a foreign port, with which there is no mode of estimating the rate of exchange, the French Code provides that the insurable interest shall be measured by the cost and charges of the goods given in barter;² the word "charges" there being intended to mean the expense of bringing them to the place of shipment, and shipping them.³

When the goods are such as entitle to a drawback on exportation, a question has been raised whether, in estimating their insurable value under an open policy, the amount of this drawback is to be deducted. The Courts of the United States have held that it is not, on the ground that, though it may enter into the estimate of the value of the goods for exportation, it is no part of their actual market price at the port of departure;⁴ and these decisions seem conformable to sound principle.⁵

Where the provisions of the policy show that it is intended to cover any interest that the assured may have at risk within the limits of the time or the voyage for which the policy is effected, and the amount of insurable interest fluctuates at different periods of the risk, the loss must be apportioned

Goods purchased by barter.

Drawback.

Continuing policies.

¹ *Thellusson v. Bewick*, 1 Esp. 77. The rate of exchange at the commencement of the risk appears a preferable standard. In France the rule is to value at the rate of exchange current at the time of subscribing the policy; Code de Commerce, art. 338.

² Code de Commerce, art. 340.

³ *Benecke, Pr. of Indem.* 119.

⁴ See these cases collected, 2 Phillips, no. 1235.

⁵ Weskett says that when goods entitle to a bounty on exportation, the bounty is to be deducted: but the other seems the better rule; see Weskett's Digest, art. "Fish," no. 1.

between the parties in the proportion which the sum insured bears to the amount of insurable interest on board at the time of loss. Such policies are sometimes called continuing policies.

Crowley v.
Cohen.

For example, the plaintiffs, barge-masters, having several boats constantly carrying goods for hire by canal between London and Birmingham, for the purpose of protecting their interest as carriers, caused themselves to be insured for twelve months, "by canal navigation boats containing goods, at work between London, Wolverhampton, Birmingham, &c., backwards and forwards, and in any rotation, upon goods, and upon the body, tackle, &c., on thirty boats, as per margin of the policy," &c. The policy proceeded,—“The said ship, &c., goods, and merchandizes, &c., for so much as concerns the assured, are and shall be (here the printed words ‘valued at’ were struck out) 12,000*l.*, on goods, as interest may appear hereafter, to pay average on each package or description, as if separately insured, &c.,—the claim on this policy warranted not to exceed 100*l.* per cent.” At the bottom of the policy was written,—“3000*l.* only to be covered by the policy in any one boat on any one trip.”

The facts were, that within the time limited in the policy, one of the thirty boats mentioned in the margin of the policy had sunk in the canal, with 1700*l.* worth of goods on board of her, which was the loss in respect of which the action was brought; and that up to the time of the loss, every one of the thirty boats named in the margin had carried goods to the amount of 12,000*l.* and upwards, so that about 360,000*l.* worth of goods had been carried to and fro by the boats named in the policy between the commencement of the risk and the loss in question.

The Court held that the real nature of the transaction being in effect equivalent to a fresh insurance taking place at the time when each boat started, and governing all that were then afloat, the mode of calculating the indemnity would be that the whole value of the goods actually afloat, in the boats named, at the time of the loss must be taken, and the

plaintiffs should recover such a proportion of the loss as 12,000% might bear to the whole value on board, supposing that value to exceed 12,000% ; if not, then the plaintiffs would be entitled to the whole amount lost.¹

The true measure, therefore, of the insurable interest in such a policy is the amount at risk at the time of the loss.

In another case the policy being differently framed, and indeed not properly a marine policy at all, there was a different result. The policy, an ordinary Lloyd's policy, was "lost or not lost at and from all or any of the wharves, banks, quays and places of arrival and departure in the river Thames, and any merchant or steam vessel of any description therein, comprising the whole extent of the said river, from Wandsworth downwards to the Victoria Docks, including all or any intermediate docks and wharves, and *vice versa*, until on board any merchant or steam vessel, barge or boat, or otherwise landed at any wharf, &c. The risk to commence on the 25th September, 1869, and to terminate on the 24th September, 1870, including both days, upon any kind of goods and merchandize in craft of every description, &c. The ship, and goods, and merchandize, &c., by agreement, &c., are and shall be valued at on all goods and produce as interest may appear." The sum stated in the margin was 2000%. At the bottom of the policy was written as follows :—"To cover and include all losses, damages, and accidents amounting to 20%, and upwards, in each craft, to goods carried by Messrs. Joyce, as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from (*sic*) which losses, damages, and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others intrusted. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his

Joyce v.
Kennard.

¹ Crowley v. Cohen, 3 B. & Ad. 478. The same principle was laid down by Mr. Justice Story, in a similar case in the United States ; see *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 383 ; 2 Phillips, no. 1228.

subscription." The defendants underwrote this policy for 100%.

During the continuance of the risk in this policy, a loss, damage, and accident, within the meaning of it, had occurred to goods loaded on board one of the assured's craft, called the *Lord Cardigan*, to the amount of 1100%, for which the assured were liable to the owners thereof, and which they had paid. The total value of the goods at the time on board the *Lord Cardigan* was 2906%, and the total value of the goods on board that and the other barges at the same time was 20,000% and upwards.

The Court said this was not an ordinary marine policy, but a policy of a mixed nature, by which the defendant indemnifies the plaintiffs against any liability to the extent of the sum underwritten, which they might incur, as carriers, to the owners of the goods entrusted to them. It was, therefore, held, on the language of the policy, that the defendant was liable for the full amount underwritten by him.¹

Subsequent
modification.

Sometimes a stipulation in the policy enables the assured at a future period to modify the risk, and therewith the liability, of the underwriter. For instance, a policy on a cargo of grain from Galatz to Emden and a port in the United Kingdom, stipulated a return of 20s. premium in case the risk were terminated at Emden. The cargo was afterwards sold afloat, freight paid, and insurance to Emden; the policy in its original condition was indorsed over, and the vendor claimed from the underwriter the return of 20s. But as the cargo was lost on its way from Emden to the United Kingdom, the vendee put the policy in suit, and was defeated by the evidence of the bought and sold notes as to the right against the underwriter.²

A very anomalous practice was brought before the Court

¹ *Joyce v. Kennard*, L. R., 7 Q. B. 78.

² *Ionides v. Harford*, 29 L. J. (Ex.)

36; *S. P. North of England Oil Cake Co. v. Archangel Marit. Ins. Co.*, L. R., 10 Q. B. 249.

of Chancery in the case of *Ralli v. The Universal Marine Insurance Company*. A cargo of grain from the Black Sea had been insured with the defendants under two policies, and was sold afloat when the market was low, and consequently at a depreciated price, including insurance. The vendor indorsed over one of the policies for its full value to the vendee, and the other for about half the amount insured in it, making together the amount of the depreciated selling price of the grain. The cargo was lost, and the vendee claimed to receive the full amount under both policies; and on appeal from Wood, V.C., the Lords Justices held him entitled to the whole. The defendants had paid the full amount into Court in the first instance; if they had not adopted this course, and the judgment of the learned Vice-Chancellor against the vendee's claim been affirmed, it is difficult to understand upon what principle in law the vendor could have based his claim to the balance.¹

Indorsed for part, though upon sale of the whole.

If a cargo be sold, freight and insurance included, payment to be in cash in exchange for shipping documents, &c., it is a question for a jury, and not the Court, whether a policy be of sufficient amount to be such a shipping document as the vendee ought to accept.²

"Shipping Documents,"

Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk and

Of double and over-insurance.

¹ *Ralli v. The Universal Marine Ins. Co.*, 31 L. J. (Ch.) 207, 313. A quibble of a singular nature has been started as to the amount recoverable. In an action on a policy, the defendants traversed the loss, and also paid money into Court for premium under the money counts. The plaintiff took the money out of Court and then recovered damages for the loss, which he claimed to be paid him to the full amount irrespective of the money

already received; but the Court defeated his injustice; *Carr v. Montefiore*; *Id. v. Royal Ex. Ass. Co.*, 34 L. J. (Q. B.) 21. The new system of pleading, according to which the money paid into Court is pleaded to be paid in on a specific account, will prevent such a contention in future.

² *Tamvaco v. Lucas*, 31 L. J. (Q. B.) 296; 30 L. J. (Q. B.) 234; 3 B. & S. 89; 1 B. & S. 185. See per V. C. 31 L. J. (Ch.) 207.

What is
double
insurance.

the same interest. This is a totally different thing from a re-insurance, by which an underwriter endeavours to secure himself from having to pay a loss. It never has been prohibited by the law maritime unless made fraudulently; indeed it is in common use, and, as a moment's consideration will show, in many cases a very necessary expedient. A merchant expecting consignments from abroad, is ignorant of their exact value; in the first instance he effects an insurance on them to an amount which, upon subsequent information or reflection, he thinks inadequate to their full value; or he may have insured as much as he is able in one place, and being still desirous of further security, may then proceed to effect additional insurances elsewhere; or, from circumstances affecting the underwriter in particular, or an occurrence of heavy losses falling upon his class about the same time, he is anxious about the worth of his security; in such cases as these, it is desirable and quite lawful to resort to double insurance.

What an
over-insur-
ance is.

If it turns out that the whole amount insured in the several policies is greater than the whole value of the interest at risk, this is called an over-insurance. In such case it is quite clear, and nowhere disputed, that the assured can only recover upon all the policies put together, supposing them to be open policies, up to the amount actually at risk; that is, in this country, the prime cost or invoice price of the goods, coupled with the expense of putting them on board and the premiums of insurance.

English rule
for adjust-
ment in case
of over-
insurance.

Thus far the maritime laws of all states are agreed. There exists, however, a difference of practice as to the mode in which this principle is to be applied to settling the claims of the assured against the underwriters on the several policies, and of these underwriters *inter se*.

The rule that now prevails in this country was established by Lord Mansfield, and is as follows:—In case of over-insurance the several policies are considered as making but one insurance, and are good to the extent of the value of the effects at risk; the assured can recover no more than such

value, but he may sue the underwriters on any one or more of the policies, and recover to the full extent of his loss, supposing it to be fully covered by the policy or policies on which he elects to sue, leaving the underwriters so sued and paying to recover, by virtue of their being subrogated to his rights, a rateable sum, by way of contribution, from the underwriters on the other policies.¹

Hence where a merchant, the value of whose whole interest was 2200*l.*, first effected a policy on this interest at Liverpool for 1700*l.*, and then (without fraud) another policy on the same interest² at London for 2200*l.*, he was allowed to recover the whole amount on the London policy, and the London underwriters were allowed to recover a rateable amount, by way of contribution, from those at Liverpool.³

Davis v. Gildart.

The rule thus established by Lord Mansfield is now the received law of the land. It is not, however, the rule which formerly prevailed in this country, or which now prevails in France, or which in the United States is generally preferred by the parties.⁴

That rule is, in the words of the Code de Commerce, "if there be several contracts [not necessarily 'policies']⁵ of insurance effected without fraud on the same subject, and the first contract insures the total value of the subject at risk, it alone shall be enforced. The insurers who have signed the subsequent contracts are freed from liability; and receive only $\frac{1}{3}$ per cent. on the sum insured. If the whole value of the subject insured is not covered by the first contract, those insurers who have signed the subsequent

In France.

¹ *Newby v. Reid*, 1 W. Bl. 416; *Rogers v. Davis*, and *Davis v. Gildart*, A. D. 1776; see 1 Marshall, Ins. 140, 141; 2 Park, Ins. 600, 601.

² But for a different risk, a point that seems, singularly enough, to have attracted no attention at the time, and therefore may for our present purpose be neglected, see *Rogers v.*

Davis, *qua supra*.

³ *Davis v. Gildart*, *ubi supra*.

⁴ For the rule in Holland, Spain, Portugal, and Sardinia, see 1 Nolte's *Benecke*, 234-236; it is substantially the same as in France.

⁵ Each subscription to the policy forms a new contract if it bears a separate date.

contracts are responsible for the surplus, in the order of the date of their respective signatures.”¹

Formerly in
this country.

So in this country it was once pleaded, and “proved by all the exchange” to be the custom of merchants, “that where a policy is subscribed by a number of underwriters, and the goods are not equal in value to the sums subscribed (taken together), the underwriters, in case of loss, shall be liable in the order in which they subscribe, and the remaining underwriters shall be exonerated from all liability, and return the premium, deducting $\frac{1}{3}$ per cent.”²

In the United
States.

The common law rule in the United States is that laid down by Lord Mansfield; but the law, as it anciently prevailed in England, and is now established in France, is deemed by the American merchants so preferable, in point of simplicity and convenience, that clauses are very generally introduced into their policies, to prevent the rule of contribution, and to make the insurers responsible according to the order of their subscriptions in point of date.³

Of same date
whether poli-
cies different.

In France, and when this rule has been adopted, in the United States also, if the second policy is dated on the same day as the first, inquiry may be made as to which of the two was actually first effected in point of time, and that which was so will alone bear the loss.⁴ In France, however, this does not extend to different subscriptions of the same date to the same policy; for in that case they make but one contract and the whole body of the underwriters, in case the sum insured in the policy exceeds the value at risk,

¹ Code de Commerce, art. 359.

² *The African Co. v. Bull*, 1 Show. 132; 1 Marshall, Ins. 142; see also Malynes's *Lex Mercatoria*, 112.

³ The clause to effect this purpose is, in the second or any subsequent policy, to this effect: “It is further agreed that if the assured shall have made any other assurance upon the premises prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient.”

In the first policy it runs thus: “In case of any subsequent insurance, the insurers shall, nevertheless, be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent assurers.” 3 Kent, Com. 280, 281.

⁴ 4 Boulay-Paty, *Droit Mar.* 122, 123; *Brown v. Hartford Ins. Co.*, 3 Day's Rep. 58; *Potter v. Marine Ins. Co.*, 2 Mason's Rep. 475, cited in 3 Kent, Com. 281.

contribute rateably to the loss, and return a rateable share of premium for the excess.¹

If the subsequent insurance be made with the fraudulent intent on the part of the assured to recover more than an indemnity, and this fraudulent intent be proved, the law of France, and that of this country, it is apprehended, will be found to be the same, is, that he should pay the whole of the premium on the second policy, and recover nothing under it.² Certainly, if the premium were already paid on the second policy, it could not in an English Court be recovered back.

If the underwriter and the assured are both aware, at the time of effecting the second policy, that the whole amount of interest has already been fully covered by the first, this, by the French law, is a mere wager and void, and the principle *cum utriusque turpitudine versatur cessat repetitio* applies,—the assured recovers nothing on such policy; and if the premium is paid, the assured cannot demand a return; if not paid, the underwriter cannot claim it.³

It has been laid down by Mr. Marshall, as following from Lord Mansfield's rule, that where by several policies made without fraud the total sum insured exceeds the whole value at risk, and the risk attaches the same day on all, then "all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects in proportion to their respective subscriptions."⁴ But if two sets of policies of different date are effected on the same property, and the entire risk attaches on the earlier whilst the latter are not yet executed, although the amount insured in the prior set is not equal to the value at risk, but the aggregate sum insured in the two exceeds it,

Rateable
return of
premium in
case of over-
insurance.

¹ 4 Boulay-Paty, Droit Mar. 116, 117.

² If he sues on the second policy he may in France be proceeded against criminally; see the general French law on the subject of fraudulent over-insurance, 1 Emerigon, c. ix. s. 2,

pp. 270-272, and the commentary of Boulay-Paty, *ibid.* pp. 272, 273. For the application of the law to the case of double insurance, see 4 Boulay-Paty, Droit Mar. 124, 125.

³ 4 Boulay-Paty, Droit Mar. 114.

⁴ Marshall on Ins. 649.

the underwriters on the later in point of date shall alone be called on for a rateable return of premium.¹

Where a double insurance has thus been effected in two or more valued policies, it has been a question whether the valuation in one policy is of any effect in limiting the amount to be recovered under the other. We have seen that it operates no such effect. The valuation in a policy is binding on the parties to it, but the sum recovered under any other policy, valued or open on the same interest and risk, goes in reduction of the amount recoverable under the policy in suit. So that if he have already recovered a sum equal to the amount of the valuation in the policy being sued on, he takes nothing by his action.²

Irving v.
Richardson.

Therefore, where 1700*l.* was insured on a ship in one policy, in which she was valued at 3000*l.*, and afterwards a further sum of 2000*l.* on the same ship in a second policy, in which she was also valued at 3000*l.*: Lord Tenterden would not permit the assured to recover more than 3000*l.* on both policies together, although it was proved that the value of the ship exceeded 3700*l.*, the aggregate of the sums insured in both.³

Morgan v.
Price.

So where a bankrupt had effected one policy on a share of a ship, the share valued at 2500*l.*, and the official assignee another policy on the same share with the same underwriters, valued also at the same sum, a plea alleging this, averring that the risk, interest, and loss under the two policies were the same, and that the 2500*l.* had been paid on the second policy, was held a good plea in discharge to an action brought by the assignees of the bankrupt on the first policy.⁴

¹ Fisk v. Masterman, 8 M. & W. 165. See this subject further considered post, Part III., Chap. IX.

² Bruce v. Jones, 1 H. & C. 769; 32 L. J. (Ex.) 132, overruling Bousfield v. Barnes, 4 Camp. 228.

³ Irving v. Richardson, 1 Mood. & Rob. 158; see also *S. C.* in 2 B. & Ad. 193.

⁴ Morgan v. Price, 4 Exch. 61; *S. C.* 19 L. J. (Ex.) 201.

CHAPTER VII.

THE SHIP AND SHIPMASTER IN THE RELATION OF CARRIER UNDER THE POLICY.

Of the ship - - - 333 Naming ship in policy - - 333 reason for - - - 333 Policy on goods by ship or ships - - - 337 declaration under - - 337 appropriation of losses - 340 Changing ship when named - 342 invalidates policy - - 342 unless justified by necessity 342	Of the shipmaster - - - 343 Naming in policy - - 343 what change vitiates policy 344 His power to borrow - - 345 to hypothecate - 346 to sell part - - 350 the whole - 351 to tranship - - 358 under abandon- ment - - 363
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THE ship, never absent from a marine policy of insurance, Of the ship.
 has already engaged attention in a previous chapter as one
 of the subjects of such a policy. We are now to consider it
 as the depôt, vehicle, or instrument, in relation to other
 subjects of insurance while in port, or while in the course
 of transit by water from port to port. In this view, its Naming the
ship in the
policy.
 importance in modern commerce cannot be exaggerated.
 But we are not speaking of ships in general. A policy at
 one period of its existence or another is ever specific and
 definite as to *the ship* or *the ships* involved in the contract.

By far the more important reason for this definite speci- Reason for
this.
 fication of the vessel lies in this, that it is thereby the means of
 specifically identifying the subject of the particular insurance.
 As merchants in buying and selling distinguish the goods
 about which they are bargaining from all other similar goods,
 say, by the warehouse that contains them, the assured and the
 underwriter take the same easy method of pointing out the
 subject of the risk about which they are contracting. The
 master's name is also added as a further means of particularly
 designating the cargo, by thus specifically distinguishing the

ship in question from all other ships of the same name and build. Accuracy, therefore, as to both is so material to the contract, that after all is executed in due form, it may turn out to be no contract whatever, merely because error herein having misled the mind of assured and underwriter each to a different subject, has thereby prevented agreement between them.

But as it is only for the purpose of identification that such accuracy is important, misdescription by name, if it be not the occasion of error as to the subject designated, does not invalidate the policy. This is a general principle of law; nil facit error nominis cum de corpore constat.¹ Accordingly, in our common policies, after the names of the ship and master, come the words, "or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called."

The following cases, although some of them are *alio intuitu*, are applicable to show the degree of accuracy practically required on this subject.

An insurance on ship was effected as on a ship called "*The Leopard*;" it appeared that the name of the ship was in fact *The Leonard*, and that she had never been called *The Leopard*; it being proved, however, that the ship lost was the same that the underwriters intended to insure, the Court held that the variance did not affect the validity of the policy.² An American ship called *The President* was described in the policy as "the good ship called '*The American ship President*;' " but as it clearly appeared that the error was a blunder of the broker's clerk, and that the ship lost was really that which the underwriters meant to insure, the error was held immaterial.³ And the decision of the Court was the same in another case, where a ship really called by the

¹ See 1 Emerigon, c. vi. s. 2, p. 160; "Error nominis alicujus navis non attenditur, quando ex aliis circumstantiis constat de navis identitate."

² Hall v. Molineaux, before Lee, C. J., 17th Dec. 1744, cited in 6 East, 385.

³ Le Mesurier v. Vaughan, 6 East, 382.

Spanish name of *Las Tres Hermanas*, was described in the policy by an English translation of the name, as "*The Three Sisters*."¹

When an insurer initials a slip, say for 5000*l.*, on hides, by ship or ships, he engages in effect to insure the goods by any ship on which they are loaded; and if he afterwards at the request of the broker initial a slip for 2445*l.* on hides by "*The Socrates*," making no inquiry as to the particular ship proposed, this second slip being expressly made in order to be substituted for the slip "by ship or ships" already mentioned, the jury are justified in finding that, regardless of what might be the name of the ship, he meant to insure the goods at a premium already fixed in the first slip, by the vessel on which these goods were really shipped.²

It happened that at another interview between other clerks of the broker and underwriter respectively, a policy for 121*l.* on part of these same goods by the *Socrates* was negotiated; and reference was made to *Veritas*, at the time lying on the desk, for the name and description of the ship, and when it was found that *Veritas* contained the "*Socrates, Albertson*," a new Norwegian ship, and the "*Socrate, Jean Card*," an old French ship, the underwriter's clerk asked whether it was the Norwegian ship that was proposed, and he was told by the other he thought it was. The event showed that the goods had been loaded on the French ship the "*Socrate, Jean Card*," and that there was a total loss; it was held that the underwriter was not liable on the policy for this loss, for he had been misled, and that upon an inquiry materially affecting the amount of the premium, into insuring goods by the Norwegian ship *Socrates*.³

Again, events of the time at sea of a character to make the underwriter cautious about undertaking risks, or about undertaking them except at an enhanced premium, may have come to hand; he may have heard of storms, of losses, and

¹ *Clapham v. Cologan*, 3 Camp. 382.

Ins. Co., L. R., 6 Q. B. 674; *L. R.*, 7 Q. B. 517.

² *Ionides v. Pacific Fire and Mar.*

³ *Ibid.*

of facts affecting particular ships; and consequently it is natural that he should be able to identify the proposed ship in order to apply this information.¹

Moreover, there are degrees of seaworthiness. Emerigon,² accordingly, has employed himself in pointing out the varieties of build and size specifically designated by technical words, as (in our language) by *ship*, *bark*, *brig*, *schooner*, *sloop*, and the like; and he has truly said that if the underwriter is fraudulently misled by the designation adopted for the vessel to suppose that he is insuring goods on board a *ship* when the vessel intended is in size and rig a *sloop*, the policy would be void. But as the generic designation *ship* is adopted, probably invariably, in English policies for vessels of every build, and therefore as synonymous with *vessel*, the question can hardly arise except as involving a charge of concealment or misrepresentation on the part of the assured, which, if proved, would invalidate the policy, or, as accompanied with circumstances of such a deviation from custom as ought to put the underwriter upon inquiry. There are means now of information in existence on this and cognate topics, such as, with all the formal particularity of Frenchmen and French administration, could hardly have been anticipated even in Emerigon's time. The public register of English shipping established by statute, and the classification of shipping registered at Lloyd's, afford the amplest means of information of the most pertinent kind.³

As the risk on any ship is very greatly aggravated by her being employed as a privateer or letter of marque, Emerigon considers, upon the principle above laid down, that a ship intended to be so employed ought to be described accordingly in the policy by which she is insured:⁴ but it is quite certain that if it were verbally represented to the underwriter that such was her purpose and destination, that would be sufficient

¹ See *Bates v. Hewitt*, L. R., 2 Q. B. 595.

² 1 Emerigon, c. vi. s. 3, pp. 162, 163, 164.

³ The continental *Veritas* supplies similar information.

⁴ 1 Emerigon, c. vi. s. 4, p. 165.

in this country, though she were not so described in the policy.

Although naming the ship in the policy be the rule, yet cases frequently occur in the extended operations of commerce, in which it is utterly impossible, or would be highly injurious, to compel the insertion in the policy of the name of the ship. A merchant who has ordered goods from abroad is desirous of effecting an immediate insurance on them, while he is ignorant of the ship by which they may be sent. In time of war, when merchant vessels take such opportunities of sailing as the varying fortunes of the belligerents chance to afford, this uncertainty is of course considerably increased. The law requires nothing which is impossible, and the commercial law, founding upon the customs and usages of the merchant, easily conforms to the exigent peculiarities of oft recurring circumstances. By the laws and practice of all maritime states, it is allowable in such circumstances as are here supposed to effect a policy on goods "on board ship or ships," upon condition of declaring as soon as the assured becomes aware of it, and, if possible, before the loss, the name of the ship or ships on board of which they have actually been loaded.¹

Policy on goods "by ship or ships."

With regard to the subsequent declaration by the assured of the name of the ship or ships when known to him, the practice generally is for the broker, on ascertaining the fact, to indorse the declaration of the name or names as a memorandum on the policy. It is not, however, necessary that this declaration should be in writing, and even if written on the policy, an error as to the name of the ship will not be fatal to the contract:

Declaration of ship's name.

¹ In England the legality of this practice was declared, as far back as 1794, to be too well established to be disputed; *Kewley v. Ryan*, 2 H. Bl. 348. In France it has been ably explained by Emerigon, c. vi. s. 5,

"Assurance in quovis," vol. i. p. 173; see also Ordonn. liv. 3, t. vi. art. 4; Code de Com. art. 337; 3 Boulay-Paty, Droit Mar. 410-413; so in the United States, see 3 Kent Com. 257, 258; 1 Phillips, no. 438.

A mistake in such declaration may be corrected.

A policy having been effected on goods, by ship or ships, the broker, afterwards, upon wrong information, made a declaration on the policy, which he got signed by the underwriter, that the goods were shipped on board *The Tweende Venner* and *The Neptunus*, but subsequently discovering that they were not on board these ships, but on board *The America*, he inscribed a fresh memorandum on the policy to that effect. The underwriter would not sign it, and afterwards refused to pay a loss, on the ground that the policy had never attached on any goods shipped by *The America*. But Lord Ellenborough held, that the declaration formed no part of the contract, nor required the signature or assent of the insurer; that the mistake, being a mere blunder, might be corrected without a fresh stamp, and that the policy attached upon the goods shipped on board *The America*, in the same manner as if the first declaration had never been made.¹

Port of loading unknown.

If the merchant is ignorant at which of several ports named the goods may be loaded on board for him, and there is besides a very extensive license to touch, stay, and trade, an insurance on goods "on board ship or ships" will attach on goods loaded at any port within the limits of the voyage insured;² though of course it would not cover a consignment sent from a different part of the world from that mentioned in the policy, or from any place, in short, not comprised within the limits of the risk, upon a fair construction of the terms of the instrument.³

Declaration before loss not a condition precedent.

As a general rule, the name of the ship ought to be declared before notice of the loss. Cases, however, may occur in which this would not be possible, as where the assured does not ascertain the name of the ship till he hears of her loss; this, therefore, never is a condition precedent to the assured's right to recover on the policy.⁴ Accordingly,

¹ Robinson v. Touray, 3 Camp. 158; 1 M. & Sel. 217.

² Hunter v. Leathley, 10 B. & C. 858.

³ Valin, tit. vi. art. 4, vol. ii. p. 46; 3 Boulay-Paty, Droit Mar. 410, and

his Comment. on Emerigon, vol. i. p. 175.

⁴ Gledstanes v. Roy. Exch. Ass. Co., 34 L. J. (Q. B.) 30; Harman v. Kingston, 3 Camp. 150.

it is now a recognized usage, of which formal proof is no longer required in each case, that such a declaration may be altered even after the loss is known, if it be altered at a time when it can be, and is, altered innocently and without fraud.¹

The London agent of the Hong Kong Insurance Company had for some time kept that company re-insured with the Royal Exchange Assurance Company for all sums in excess of 5000*l.* upon any one ship under a Hong Kong policy. The manner was to effect a policy of re-insurance for 7000*l.* or 10,000*l.* on goods by ship or ships, to be afterwards declared as particulars came to hand by the Calcutta mail. On the 16th of March, 1860, *The Red Gauntlet* was posted at Lloyd's as having been burned and scuttled, with partial salvage of her cargo. On the 17th, the residue of the sum under the existing policy to the extent of 5000*l.* was appropriated to three specific ships in different proportions; and, on the 19th, a new policy was effected for 10,000*l.* on goods by ship or ships, lost or not lost. On the 21st, the Calcutta letters announced to the agent that particulars for insurance

Gledstanes v.
Roy. Exch.
Ass. Co.

¹ Gledstanes v. Roy. Exch. Ass. Co., *supra*; Ionides v. Pacific Fire and Mar. Ins. Co., L. R., 6 Q. B. 674; 7 Q. B. 517; and per Brett, J., Stephens v. Australasian Ins. Co., L. R., 8 C. P. 18, 23. A more comprehensive usage was admitted in this latter case, and as it was not unreasonable, it bound the parties to the case.

The usage stated there was in these words:—"According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods, he is bound to declare them to the underwriter on the policy, and to

declare them in the order in which they are shipped. He is not entitled to declare some of the risks, and remain his own insurer as to the others. In case, by oversight or otherwise, the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations, and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. Declarations are often thus rectified, and sometimes even after loss."

The usage, as here stated, was recognized in the case of the Imperial Mar. Ins. Co. v. Fire Ins. Corp. Limited, 4 C. P. Div. 166.

on *The Red Gauntlet*, under the open policy, would be sent by next mail, and he immediately desired the defendants to apply the existing policy to *The Red Gauntlet*. This was refused by the company, but the Court held, to the contrary, that the plaintiff was entitled to have the policy so applied.¹ It is always expected, and it may be made an express condition that the assured shall declare his interest at the earliest possible opportunity.²

To which of several policies loss is to be appropriated.

There is occasionally a very nice question as to the appropriation of the loss to a particular policy when there are two or more policies of this description open. In this country it has been established by the following decisions, that the assured has a right to declare on any of the policies a loss on board any ship he pleases that comes within the terms of such policy.

In England.
Henchman v. Offey.

A merchant in India caused two insurances to be effected by his agent in London, one for 6000*l.* on goods "on board any ship or ships which should sail from Bengal to London, between the 1st November, A.D. 1779, and the 1st of July, 1780;" the other on goods "on board any ship or ships which should sail [on the same voyage] between 1st February, and 31st December, 1780." He loaded goods to the amount of 4889*l.* on board *The General Barker*, and to the amount of 4500*l.* on board *The Ganges*, and entered a declaration before Sir Elijah Impey, then Chief Justice in Bengal, that he had shipped by *The General Barker*, 4889*l.* of the risk intended to be covered by the 6000*l.* policy.³ Both ships sailed within the time mentioned in the *first* policy. *The Ganges* arrived safe, but *The General Barker* was lost. The plaintiff claimed a total loss under the 6000*l.* policy, which, under these circumstances, he contended he had a right to apply to *The General Barker*. Lord Mansfield at the trial, and afterwards in Banc, held that he had a right so to apply

¹ *Gledstanes v. Roy*. Exch. Ass. Co., 34 L. J. (Q. B.) 30.

² See *Weskett*, 520; 1 *Phillips*, no. 438.

³ Lord Mansfield overruled an objection taken at the trial to the admissibility of this declaration in evidence, and allowed it to be read.

it, and he recovered accordingly 4889*l.*, the value of the goods shipped on board *The General Barker*.¹

Freeland and Rigby, a mercantile house at St. Vincent, directed the plaintiffs, their Liverpool correspondents, to get 1260*l.* insured on cotton by *The Elizabeth* from Granada to London; and 1300*l.* on other cotton, by some other ship that would sail by the first convoy. This they did, and the 1300*l.* on goods by ship or ships was insured, 700*l.* in Liverpool and 600*l.* in London. The 700*l.* policy contained a warranty to sail on or before the 1st August, 1793, and no exception of the goods on board *The Elizabeth*. *The Elizabeth* arrived safe in Liverpool: *The Heart of Oak*, by which the second cargo turned out to have been shipped, was totally lost on the voyage; both ships having sailed before the 1st of August, the time warranted for sailing in the 700*l.* policy.² The plaintiff's claim for a total loss on this policy was resisted, mainly³ on the ground that a ship, answering the description and having on board property of Freeland and Rigby, to the amount insured, had arrived, and had satisfied this policy. The Court, however, held, that the assured had a right to apply such an insurance to whatever ship he thought proper within the terms of it, and was, therefore, under the circumstances, entitled to recover the whole sum therein insured.⁴

In France, if the assured has effected an insurance to a certain amount in gross "on goods on board ship or ships," and afterwards declares the names of the ships on board which his goods are shipped, and the insurer does not specify the precise sums which he means to underwrite on each ship, the assured may distribute the gross sum in what proportions he pleases among the different ships in case of loss of any of them, notwithstanding the value of the cargoes by those ships which have arrived exceed the whole amount of the

¹ *Henchman v. Offley*, 2 H. Bl. 345, note.

² 2 H. Bl. 346. Mr. Marshall omits this circumstance, *Ins.* 168.

³ The other ground was as to the

legality of insurances on ship or ships, as to which, however, the Court entertained no doubt.

⁴ *Kewley v. Ryan*, 2 H. Bl. 343; 1 Marshall, *Ins.* 168.

insurance. On the contrary, if the underwriter had specified the amount insured by him on each, he would have been liable for that in each case respectively, and no more.¹

To change
the ship

It is an implied condition of the policy that the ship named therein should not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for any unnecessary or unsanctioned change of the ship produces an alteration of the risk underwritten, and, therefore, exempts them from liability.²

invalidates
the policy,

This holds good though the substituted ship be as good or better than that originally named in the policy.³ On whichever side the advantage be, whether in favour of the original ship, or of that which is substituted, and although both ships perish on the voyage, the underwriter is, nevertheless, discharged from all liability, for the policy never attached upon the goods on board the substituted ship.⁴

Thus, if the underwriter has agreed to insure three several parcels of goods, each of the value of 1000*l.*, one on board *The St. Joseph*, another on board *The Triton*, and a third on board *The Syren*, making together 3000*l.*, but the merchant afterwards loads these parcels all on board *The St. Joseph*, the underwriter is liable only on the policy on goods by *The St. Joseph*, to the extent of 1000*l.* and no more; and as to the remaining 2000*l.* he is discharged, although all the three ships have equally perished in the course of the voyage.⁵

unless it be
under consent
or necessity.

If, however, the underwriters consent to the change of ship, or, if in course of the voyage the ship be so disabled as

¹ 1 Emerigon, c. vi. s. 5, p. 174; and Boulay-Paty's Commentary, *ibid.* 178; see also Code de Commerce, art. 361; and 4 Boulay-Paty, Droit Mar. 130-136.

² Upon this subject, generally, consult Emerigon (c. xii. s. 16, vol. i. pp. 419-426), who discusses it with his usual masterly display of research

and reasoning; see also Pothier Traité d' Assurance, nos. 68, 69, 70, 71.

³ 1 Emerigon, c. xii. s. 16, p. 420.

⁴ Pothier, no. 68, p. 111, par Estrangin; 1 Emerigon, 421.

⁵ Pothier, Traité d' Assurance, no. 68; Code de Commerce, art. 361; 4 Boulay-Paty, Droit Mar. 132.

to be incapable, by any means at the master's disposal, of being repaired at all, or in time to take on the cargo, and the master, as agent for all concerned, procure another ship, in which to forward the cargo to its port of destination; in such case, the change of ship does not discharge the underwriters on goods, freight, or profits, from the liability for loss on the subjects insured, though the loss occur subsequently to the change of ship.

We shall proceed now to consider the duties of the master, and to discuss those cases of necessity which give him the right, if they do not impose upon him the duty, of forwarding the goods in another ship.

It is not intended, in this place, to enter at any length Of the master. into those general duties and obligations of the master, in regard to the conduct of the ship, which more properly form part of a professed treatise on shipping;¹ nothing more is proposed than to notice such points only, in respect of the master, as have a bearing more or less direct on the subject of sea insurance; and to this end we will consider—1. The naming of the master in the policy, and subsequently changing him; 2. His power, in a port of distress, of hypothecating the cargo, or selling part of it, in order to repair the ship; 3. His power, in certain cases, to sell the ship or the whole cargo; 4. His power, in case the first ship is disabled, of sending on the cargo in another; and 5. The relation in which he stands to the assured and to the underwriter in case of abandonment.

After the blank left in our common printed forms of policy for the name of the master come the following words: Naming the master in the policy.
—“or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called.”

¹ See MacLachlan on Shipping, cc. iv. and v.; *De Cuadra v. Swann*, 16 C. B., N. S. 772.

From this clause it is abundantly evident, that it is no implied condition in our English policies either that the master should be correctly named, or that the same master should continue on board throughout the voyage.

The law is the same in France.¹ At the same time, it is the law of France, as it is of England, that in case a change be made, it be not such a change as would increase the risk of the underwriters, *e.g.* by substituting in time of war a belligerent instead of a neutral as master.²

What change
vitiates the
policy.

But although a change of the master may be made without the consent of the underwriters, and before the commencement of the voyage, it is incumbent on the assured to make it in perfect good faith, and to provide a substitute of competent skill.³ If the substitution can be shown to have been effected for any fraudulent purpose, it will, of course, vitiate the policy.⁴

Suppose that a British ship sails with a certificated master and mates, and immediately she is outside the port a relative of the owner who has no certificate, suppose for no other reason than that he is under age, takes the command, is the policy valid, although the infant be not named master in it? And even though he be named in it, is the ship seaworthy under command of an uncertificated master? In both cases it is with the privity of the owners. In the first case there seems to be a legal fraud upon the underwriters, which vitiates the contract.⁵ The second case appears to be determined in principle by the decision in *Farmer v. Legg*, where the policy was held void because the ship, when employed in the slave trade, was under the command of

¹ 1 Emerigon, c. vii. ss. 1, 2, 3, pp. 184-190.

² 1 Emerigon, p. 187; Boulay-Paty, in his Comment. *ibid.* 188, agrees with Emerigon in this construction of the clause.

³ See *Walden v. Firemen's Ins. Co.*, 12 Johnson's R. 138; 3 Kent, Com. 257, note.

⁴ Boulay-Paty on 1 Emerigon, c. vii. s. 2, p. 189. See the *Morocco Land and Trading Co. (Limited) v. Fry*, 11 L. T., N. S. 618; 11 Jur., N. S. 76, *coram* Stuart, V.-C.

⁵ See *The Morocco Land and Trading Co. v. Fry*, *coram* Stuart, V.-C., 11 L. T., N. S. 618; 11 Jur., N. S. 76.

an uncertificated master, contrary to the 31 Geo. 3, c. 54, s. 7.¹

If, in course of the voyage, by reason of death, disability, or other necessary cause, the master originally named in the policy be rendered incapable of acting, or if he abandon his command, the substitution of another captain in such case of necessity, will, of course, in no way affect the validity of the policy.² Even in such case, however, the command should not be delegated to a master belonging to a belligerent nation in time of war; nor, except in case of absolute necessity, if the ship be British, ought the appointment to be conferred on any one that does not possess a British certificate of qualification for master on such a voyage.³

Otherwise if the change be of necessity.

The duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship (if there be a reasonable prospect of doing so at an expense not ruinous) and to bring home the cargo, and earn the freight if possible.⁴ To accomplish this object of repairing his vessel, the master is authorized to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his

Master's powers of borrowing under necessity.

¹ *Farmer v. Legg*, 6 T. R. 186. See the provisions requiring certificated masters, mates, and, for steamers, engineers also, 17 & 18 Vict. c. 104, s. 136; 25 & 26 Vict. c. 63, s. 5. And for the construction of the statute, see in addition to *Farmer v. Legg*, supra, *Freard v. Dawson*, 1 Marsh. Ins. 171, and *Cunard v. Hyde*, 29 L. J. (Q. B.) 6, compared with *Cunard v. Hyde*, 27 L. J. (Q. B.) 408; and *Wilson v. Rankin*, 34 L. J. (Q. B.) 62. The latter two of these cases being decided upon the same statutory provision (16 & 17 Vict. c. 107, ss. 170, 172, now repealed, as to loading tim-

ber on deck) determine that the policy is not void if the assured is not privy to the unlawful acts of the master. So *Australasian Ins. Co. v. Jackson*, 33 L. T., N. S. 286, coram P. C. on the Kidnapping Act, 35 & 36 Vict. c. 19.

² 1 *Emerigon*, c. vii. s. 3, pp. 189, 190.

³ 17 & 18 Vict. c. 104, s. 136.

⁴ Opinion of the Judges in *Benson v. Chapman*, 2 H. L. Cas. 696, 720. The 39 & 40 Vict. c. 80, s. 4, making it a misdemeanor in him to take the ship to sea in an unseaworthy state so as to endanger life, is *alio intuitu*.

remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale, and in this case the shipper may sue the shipowner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the shipowner for his account and use, to enable the agent to do his duty by repairing the ship. The agency, for the purpose of borrowing by these various modes, and so binding his owner to the lender, is cast upon the master by the necessity of the case.¹ He may also hypothecate the ship or the freight, or both, which gives the lender a right of arrest by Admiralty process.

Prior communication required.

There is this one condition, however, imposed by the law on these various powers as an indispensable prerequisite to their exercise, that the master is bound to communicate with the owner of the subject to be so dealt with, whenever such communication is under the circumstances practicable, and would not be attended with such delay as must prove seriously detrimental to the interests involved.²

Power to hypothecate.

It is not proposed to consider here the authority of the master to bind his owner by borrowing money to repair, or by causing repairs to be done on his credit,³ but merely to notice a few points connected with his power to hypothecate and sell the cargo, or part of it. With regard to his right to hypothecate, it is now clear law, that in cases of justifying necessity, or to use the language of Lord Stowell, in the celebrated case of *The Gratitude*—"of instant, unforeseen, and unprovided necessity," the master having no other means whatever of procuring funds, may hypothecate not the ship only, but the cargo also, in order to raise money for the

¹ Judgment of Court of Exchequer in *Duncan v. Benson*, 1 Exch. 555; affirmed in *Benson v. Duncan*, 3 Exch. 655.

² *Maclachlan, Shipping*, 141, 147.

³ See *Maclachlan on Shipping*, c. iv. pp. 139, 143.

repairs of the ship.¹ In such cases the master, who in the ordinary course of things is a stranger to the cargo, except for the purposes of safe custody and conveyance, has forced upon him the character of agent and supercargo, not by the immediate act and appointment of the owner, but by the general policy of the law.²

The extent of this agency in respect of the cargo, is to bind it to the lender on respondentia; a right of action overlying for the owner of the cargo against the owner of the ship, when the ship is the sole occasion of such borrowing.³

The master of *The Lord Cochrane* in consequence of sea-damage hypothecated for repairs the ship, freight, and cargo, including the plaintiff's goods. The ship when afterwards sold, and the freight, produced less than the sum borrowed. The plaintiff being obliged to contribute towards the difference, and to pay costs in the Court of Admiralty, brought his action for the whole of this loss against the owner of the ship, on an implied promise to indemnify. The Court of Exchequer unanimously sustained the action,⁴ and the Court of Exchequer Chamber on a bill of exceptions, in effect affirmed the judgment.⁵ Patteson, J., delivering the judgment of the latter Court, lays down the law as to the authority of the master, and the liability of the shipowner in the following terms:—

“In ordering the repairs of the ship, the master acts Master agent
of shipowner.

¹ *The Gratitude*, 3 Rob. 240.

² *Id.* 260.

³ “The case of *The Gratitude* dealt only with the authority of the master in respect of binding the cargo to the lender of the money, it determined nothing as to the relative rights of the owners of the ship and of the cargo *inter se*,” per Patteson, J., delivering the judgment of the Exchequer Chamber in *Benson v. Duncan*, 3 Exch. 655.

⁴ *Duncan v. Benson*, 1 Exch. 537; *S. C.*, 17 L. J. (Ex.) 238.

⁵ The bill of exceptions was ten-

dered to the ruling of the learned Judge who tried the cause on the second count; the second count was on the bill of lading for the non-delivery of the plaintiff's goods by the defendant, the shipowner, and the bill of exceptions raised two substantial questions, viz. whether as against the owners of the ship, the master, under the circumstances, had authority: 1. To order the repairs; 2. To execute the bottomry bond. The Court of Exchequer Chamber held in the affirmative on both.

exclusively as the agent of the owner of the ship. No other person but the owner of the ship and his agent can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by perils of the sea, and he is bound by it if prevented by inherent defects in the ship. Being then the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for them? If, in order to borrow that money, he is obliged to hypothecate, not only the ship, but the cargo, he, in effect, borrows money on the cargo for the benefit of the shipowner, just as much as he would have done had he sold a part of the cargo to raise the necessary funds, in which case, it is not doubted that the shipowner must have indemnified the owner of the cargo."¹

Necessity is
the origin and
criterion of
the power.

Necessity is the origin of the master's authority to borrow; and if simpler powers fail him, necessity is still the criterion of his authority to resort to powers of a more extensive and extraordinary nature.² He must, in the first instance, endeavour to raise the money upon the credit of his owners; if that resource fail him, and only then, will he be justified in resorting to hypothecation.³ It is nowhere laid down that for the ship's purposes he shall not in the first instance resort to hypothecation of the cargo, but so natural is it to expect one in such a situation to supply his owner's necessities from their own resources, that if ship, freight, and cargo be hypothecated in separate bonds, the Court of Admiralty will exhaust the proceeds of ship and freight before calling upon the owners of cargo to contribute.⁴ Indeed a lien on cargo for the uses of the ship is said impliedly to include ship and freight also.⁵ The law expects him, however, to communicate with the owners of ship or cargo before exercising any of

¹ *Benson v. Duncan*, 3 Exch. 655, 666; *S. C.*, 18 L. J. (Ex.) 172, 173.

² *Maclachlan on Shipping*, 141-167.

³ *Per Jervis, C. J.*, in *Stainbank v.*

Fenning, 11 C. B. 88.

⁴ *The Constancia*, 10 Jur. 845; *Maclachlan on Shipping*, 706.

⁵ *Maclachlan*, 706.

his extraordinary powers of borrowing, except where the opportunity of communication is not correspondent with the existing necessity.¹ The right to hypothecate, usually exercised in countries other than that of the owners' residence, may be resorted to even in a port of the country where his owners reside, provided the master have no means of communicating with them, and there is no other mode of escaping from the pressure of the necessity.²

This power of the master is confined to hypothecation, strictly and properly so called, as distinguished either from a mortgage, which transfers the property, or a pledge or pawn at common law, which gives such a lien on the chattel as is void without actual possession. Hypothecation gives a maritime lien which exists independently of possession, and which may be enforced against the subject of it, through the medium of legal process on the termination of the voyage; moreover it is essential to the validity of hypothecation, that the sea risk should be incurred by the lender, and that the privilege or claim should take effect only in the event of the ship's safe arrival.³

Hence, where the master, besides drawing bills on his owners, also executed an instrument purporting to be an hypothecation of ship, cargo, and freight, whereby the merchant forbore to take maritime interest, and the master took on himself and his owner the risk of the voyage, making the money payable in any event, it was held that this was beyond the scope of his authority as agent, and did not, therefore, bind his owner to the merchant who had advanced the money.⁴

But as instruments of hypothecation are the creatures of

¹ *Wallace v. Fielden*, 7 Moore, P. C. 398, 409; *The Hambrugh*, coram P. C., 33 L. J. (Ad.) 116; *Kleinwort & Co. v. Cassa Maritima of Genoa*, 2 App. Cas. 156; *Mac-lachlan*, 141, 147.

² *La Ysabel*, Bozzo, 1 Dods. Ad. 273; *The Trident*, Simson, 1 W. Rob.

Ad. 29.

³ See the judgment of Jervis, C. J., in *Stainbank v. Fenning*, 11 C. B. 88, and of Parke, B., in *Stainbank v. Shepard*, 13 C. B. 441.

⁴ *Stainbank v. Fenning*, 11 C. B. 51; *Stainbank v. Shepard* (in the Exch. Chamber), 13 C. B. 418.

Power to hypothecate, not to mortgage or pawn.

necessity and distress, and usually contain the language of commercial men and not of lawyers, they receive a liberal construction.¹ If, therefore, the risk should not be mentioned in express terms, yet it will suffice, if it can be fairly and reasonably inferred from the whole document, that it was the intention of the parties to make the repayment of the money dependent on this contingency.²

Power to sell
portion of
cargo.

The sale of portion of the cargo by the master for repairs of the ship in a port of distress, stands on the same conditions as his other borrowing powers, and is of the nature of a loan from the owner of the goods.³ It is only to be exercised for the purpose of enabling the ship (or a substituted ship as it should seem) to proceed with the cargo, or the residue of it, on the voyage chartered or insured; and, if the master unduly puts an end to the voyage insured, it is held in the United States, apparently on very good grounds, that the master is not justified in selling any part of the cargo for repairs for a new voyage.⁴

Amount
which the
owner of the
goods sold is
entitled to
recover.

The owner of the goods, whether or not the ship afterwards arrives at her destination, is entitled to recover as against the shipowner in respect of the goods so sold; and he may claim, at his option, either the price for which the goods actually sold at the port of distress,⁵ or, the amount for which they would have sold at the port of discharge.⁶

¹ MacLachlan on Shipping, 62.

² *Id.* 60.

³ See the judgment of the Exchequer in *Duncan v. Benson*, 1 Exch. 555.

⁴ *Watt v. Potter*, 2 Mason, R. 77; 3 Kent, Com. 173.

⁵ *Campbell v. Thompson*, 1 Stark. 490; *Richardson v. Nourse*, 3 B. & Ald. 237; see *Hopper v. Burness*, 1 C. P. Div. 137.

⁶ *Per curiam*, *Atkinson v. Stephens*, 7 Exch. 567, 573, 575; *Alers v. Tobin*, *Abbott on Ship*. 256;

Hallett v. Wigram, 9 C. B. 580; *S. C.*, 19 L. J. (C. P.) 281.

It is singular that doubts should have been raised about the shipowner's liability for the price of the goods sold by his captain, in case the ship is afterwards lost before arrival. Lord Tenterden inclines to the opinion of Emerigon as the more reasonable, viz., that the money is only payable in case of the ship's arrival, on the ground that the merchant is thus not placed in a worse condition than if his goods had not been sold, but had

As this power of selling the goods of the shipper for the repairs of the ship is conferred for the sake of ultimately procuring the arrival of some part of the cargo in the repaired ship, it extends to the sale of part only of the cargo, and not of the entirety; for it is not to be presumed to be for the interest of the shipper that the whole should be sold, in order to enable the ship to proceed empty to her port of destination.¹

Right of sale for repairs can extend to part only of cargo.

On the other hand, the master may well hypothecate the entirety of the cargo, as that may be for the benefit of the whole, by providing means for forwarding the whole to a proper market, where it may realize far more than the amount raised on hypothecation, and the expenses of the loan.² It will be sufficient here to have pointed out thus generally the extent and limits of this power, reserving any particular instances of its exercise for a more detailed examination in subsequent parts of this work.³

But the whole cargo may be hypothecated.

The point of the preceding inquiry was, the extent of the master's power to hypothecate ship and cargo, or sell part of her cargo for the purpose of repairing the ship, and enabling her to prosecute her voyage. The cases now to be considered are those in which the further prosecution of the enterprise has become hopeless—where the ship cannot be repaired or the cargo forwarded—under which circumstances, by a still further extension of his powers, he is justified, from the paramount necessity of the case, in selling the ship or the whole of the cargo, or both.⁴

Power of the master to sell ship, or the whole cargo.

It is obvious that nothing but a case of absolute and supreme necessity, such as sweeps all ordinary rules before

remained on board; Abbott on Shipping, pp. 257, 279, 10th ed. See the authorities considered, Maclachlan on Shipping, 440-443.

¹ Freeman v. East India Co., 5 B. & Ald. 617; per curiam, Duncan v. Benson, 1 Exch. 537, 555.

² The Gratitudine, 3 Rob. Rep.

240; and see Duncan v. Benson, 1 Exch. 537; Benson v. Duncan, 3 Exch. 655.

³ See post, Part III., Chaps. IV., VII., VIII., and elsewhere.

⁴ See Maclachlan on Shipping, 156, 159.

it, can justify such a sale on the part of the master. He is employed, as servant of the owners, to navigate the ship, and, as agent for both the shipowner and the merchant, to carry the goods to their port of destination; and his disposal by sale of that which he is thus entrusted to navigate or convey, would in ordinary cases be the mere unauthorized act of a servant manifestly exceeding his commission. Extreme emergencies, however, may arise in which the master, at a distance from his home port, and without available opportunity of consulting either the shipowner or the merchant, has no alternative left him, acting with perfect good faith as a prudent and skilful man, and for the best interests of all concerned, but to sell the property entrusted to his charge. What those circumstances and what that emergency may be which will justify him in thus acting, we shall have frequent occasion to consider, in treating of the question of constructive total loss on ship and goods: we therefore confine ourselves here to a brief statement of the nature of the power, and the limitations on its exercise.

Nature of this power as vested in the master by the necessity of the case.

The nature of this power has been thus expressed by Parke, B. :—"The master has, by virtue of his employment, not merely those powers that are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit."¹

Limitations on this power, as it relates to sale of ship.

If the ship be driven ashore and wrecked to pieces, or no longer retains the character of a ship at all, the master is clearly justified in selling the remains of the wreck.² But this is an extreme case.

If the master, after the utmost endeavours, is compelled to renounce all hope of bringing her home, either on account of the physical impossibility of extricating her at all with the means at his command, or of his inability to find the

¹ *Hunter v. Parker*, 7 M. & W. 342.

² *Cambridge v. Anderton*, 2 B. & Cr. 691.

necessary funds for the purpose,—in such case, if the danger is imminent, and delay likely to prove destructive, the master is justified in selling the ship as she lies, although at the time of sale she still retains the character of a ship.¹

Thus, to take the case put by Lord Stowell, in *The Fanny and Elmira*, of a ship cast away in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair, and all this at such a distance from the home port that the ship may rot before the master can hear from his owners, our Courts in such a case have held a sale by the master to be justifiable.²

The exercise, however, of this power is most jealously watched by the English Courts, and rigorously confined to cases of extreme necessity, a necessity that leaves the master no alternative as a prudent and skilful man, acting *bonâ fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, but to sell the ship as she lies.³

If he come to this conclusion hastily, either without sufficient examination into the actual state of the ship,⁴ or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril, or to raise funds for her repair,⁵ he will not be justified in selling, even though the danger at the time appear exceedingly imminent.⁶

¹ *Robertson v. Clarke*, 1 Bing. 445; *Mount v. Harrison*, 4 Bing. 388; *Hunter v. Parker*, 7 M. & W. 342.

² *The Fanny and Elmira*, Edw. Ad. 117; see also *Read v. Bonham*, 3 B. & B. 147; *The Margaret Mitchell*, 4 Jur., N. S. 1193; *Swab. Ad.* 382; *The Glasgow*, *Swab. Ad.* 145; *The Bonita*, *Lushington's Ad.* 252.

³ *Alcock v. Royal Exch. Co.*, 13 Q. B. 29; *Knight v. Faith*, 15 Q. B. 649; see *Farnworth v. Hyde*, 34 L. J. (C. P.) 207. This latter case went off on appeal upon the comparison

of *expenditure with value* which in the result defeated the constructive total loss claimed against the underwriters; *L. R.*, 2 C. P. 204.

⁴ *Hayman v. Moulton*, 5 Esp. 65; *Reid v. Darby*, 10 East, 143; *Doyle v. Dallas*, 1 Moo. & Rob. 48.

⁵ *Gardner v. Salvador*, 1 Mood. & Rob. 118; *The Fanny and Elmira*, Edw. Ad. 117.

⁶ *Idle v. Royal Exch. Co.*, 3 B. & B. 151, in which the Court of King's Bench reversed the judgment of the Common Pleas which had been given

A mere difficulty in procuring the necessary funds¹ or the necessary materials for repairs,² although it may be very considerable, and such as to impose great sacrifice of time and money, will not justify the master in selling instead of repairing.

In the United States.

In the United States, the limitations upon the exercise of this power do not seem to be even yet very certainly defined. In some cases a more extensive liberty than that allowed by the English rule, has been avowedly conceded, and the position advanced, that the master may sell in all cases where he has good reason to believe that the owner would elect to abandon, *i.e.*, in all cases of constructive total loss.³ On the other hand, the stricter doctrine of the English law has been asserted and maintained in more recent decisions of the Courts of Massachusetts,⁴ which derive additional sanction from the opinion of Chancellor Kent, who declares "the strict rule to be the one best supported by reason and authority."⁵

In France.

In France, the *Ordonnance de la Marine*, following in this respect the maritime laws of the middle ages,⁶ absolutely prohibited the master from selling the ship in any case, except under the special direction of the owners;⁷ the same absolute prohibition was contained in the draft of the new *Code de Commerce*: but on strong representations of the mischiefs that might ensue from so rigorous a rule, it was relaxed, and the sale of the ship by the master was permitted in the sole case "of innavigability legally certified" (*innavigabilité légalement constatée*), that is, as Boulay-Paty

in favour of the right to sell; 8 Taunt. 755; *Cobequid Marine Ins. Co. v. Barteaux*, L. R., 6 P. C. 319; see, however, *Hunter v. Parker*, 7 M. & W. 342.

¹ *Somes v. Sugrue*, 4 C. & P. 274.

² *Furneaux v. Bradley*, 1 Park, Ins. 365.

³ *American Ins. Co. v. Center*, 4 Wendell's (Sup. Court) R. 45.

⁴ *Gordon v. The Massachusetts Fire and Mar. Ins. Co.*, 2 Pickering's R.

249; *Hall v. The Franklin Ins. Co.*, 9 Pickering's R. 466.

⁵ 3 Kent, Com. 173, 174, note; *Accord*. 2 Parson, Ins. 147.

⁶ The *Jugemens d'Oleron*, art. 1; the *Laws of Wisby*, art. 13, and those of the *Hanse Towns*, art. 57, expressly prohibit the master from selling the ship in any case; 2 Boulay-Paty, *Droit Mar.* 85.

⁷ *Ord. de la Marine*, liv. ii. tit. 1, art. 19.

explains it, upon the report of experienced navigators, appointed to act as surveyors by the local authorities, and followed by a formal condemnation in the local tribunals.¹

The French jurists confine the "innavigability," spoken of in the Code, to the single case, in which the ship cannot be repaired so as to continue its voyage or keep the sea,—(il faut que le navire ne puisse achever son voyage, et qu'il soit jugé incapable de faire son retour :—il faut que le navire ne puisse pas être raccommodé, et qu'il soit hors d'état de naviguer).²

Boulay-Paty considers this prohibition to sell as a very important safeguard of the interest of shipowners against the frauds of the master; and remarks, that the Courts cannot be too strict in confining it to the sole case of real and *bonâ fide* innavigability in the sense above explained.³ It is remarkable, that among the representations addressed to the French legislature, in order to induce them to relax the ancient rule, one of the cases stated as showing its hardship, and in which the power of sale seems still denied, is where the cost of repairing the ship will exceed its value when repaired (pour ne pouvoir être réparé sans qu'il en coûte sa valeur et au-delà). As no notice is taken of this case, either by Boulay-Paty or Pardessus, in interpreting the legal meaning of the word "innavigabilité," used in the 237th article of the Code, it is fair to conclude, that, in the opinion of these eminent jurists, the case supposed would not warrant the master in selling, and that the rule of the French law on this point is more rigorous than our own.

In one case in the United States, the power of the master to sell was limited to a foreign coast;⁴ but it has since been decided there, by Story, J., that in a case of overwhelming urgent necessity, the master has a right to sell the vessel

¹ 2 Boulay-Paty, 86; Code de 606.
Comm. art. 237.

³ 2 Boulay-Paty, 89.

² 2 Boulay-Paty, Droit Mar. 88; ⁴ Scull v. Briddle, 2 Wash. Circ.
see also 3 Pardessus, Droit Com. no. Court R. 150.

as well on a home as on a foreign shore, and whether the owner's residence be near or at a distance.¹

The power of
selling the
whole cargo.

His power to sell the whole cargo depends on exactly the same principles as the power to sell the ship, and, like it, can only be exercised in cases of extreme necessity.

In the admirable language of Lord Stowell, "though the master, in the ordinary course of things, is a stranger to the cargo, beyond the purposes of custody and conveyance; yet in cases of instant and unforeseen and unprovided necessity, the character of supercargo or agent is forced on him by the general policy of the law, unless the law can be supposed to mean that valuable property in his hands is to be left without protection or care."²

In respect of a perishable cargo, which was the case under consideration, the learned judge says,—“Suppose the case of a ship driven into port with a perishable cargo; or suppose the vessel unable to proceed, or to stand in need of repairs, what must be done? The master, in such case, must exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it; he is not bound to tranship, he may not have the means of transhipment, but even if he has, he may act for the best in deciding to sell. If he has not the means of transhipment he is under an obligation to sell the cargo, unless it can be said that he is under an obligation to let it perish.”²

Where the ship is disabled, and the cargo, being sea-damaged, and of a perishable nature, is in danger of being destroyed by the rapid progress of putrefaction if not sold, it is in the master's power, if not his duty, immediately to sell it;³ and this duty, it seems, would be equally imperative, or, at all events, the authority equally clear, in such a case, were the ship not permanently disabled, but capable, after repair, of taking on the cargo.⁴

¹ The brig *Sarah Ann*, 2 Sumner's R. 206, cited 3 Kent, Com. 174, note.

² Per Lord Stowell in *The Gratitude*, 3 Rob. Rep. 240, 257, 259.

³ *Vlierboom v. Chapman*, 13 M. & W. 320.

⁴ *Roux v. Salvador*, 3 Bing. N. C. 266.

The power of sale, however, where the ship is not disabled, or where there is the means of transshipment, must be strictly confined to cases in which the cargo is of a perishable nature, and has suffered so much sea-damage as renders it physically impossible for it, if sent on, to arrive in species at its port of destination.¹

Where the original ship is disabled, but there is means of transshipment, and the cargo neither of a perishable nature, nor sea-damaged, the master is not justified in selling, but is at all events entitled to tranship.² On the other hand, if there be no means of transshipment, or hope of any, or if the cost of saving and transshipping and sending home the cargo would be more than its worth when landed at its port of destination, the master might possibly be held empowered to sell the cargo if he had the opportunity, though it were neither sea-damaged nor of a perishable nature.³ But if not otherwise justifiable, it will not be justified by decree of a Vice-Admiralty Court ordering such sale.⁴

"In our opinion," say James and Cotton, L.JJ., "purchasers of cargo from a master cannot justify the sale, unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination." In this case, the insurers of cargo filed a bill against the purchasers of cargo to have the purchase set aside and the purchasers treated as salvors only. The plaintiffs were successful.⁵

The justifiable sale by the master of a perishable cargo at a port of distress transfers the property, and binds the shipper

The master
not agent of
shipper for

¹ *Hunt v. Royal Exch. Ass. Co.*, 5 M. & Sel. 55; *Roux v. Salvador*, 3 Bing. N. C. 266; *Wilson v. Royal Exch. Co.*, 2 Camp. 623; *Meyer v. Ralli*, 1 C. P. Div. 358.

² *Anderson v. Wallis*, 2 M. & Sel. 240; *Wilson v. Millar*, 2 Stark, N. P. 1; *Morris v. Robinson*, 3 B. & C. 196; *Freeman v. East India Co.*, 5 B. &

Ald. 617.

³ Per Bayley, J., in *Hunt v. Royal Exch. Ass. Co.*, 5 M. & Sel. 56, 57.

⁴ *Van Omeron v. Dowick*, 2 Camp. N. P. 42; *Reid v. Darby*, 10 East, 143; *Morris v. Robinson*, 3 B. & Cr. 196.

⁵ *Atlantic Mutual Ins. Co. v. Huth*, 16 Ch. Div. 474, 481.

purpose of
creating *pro*
ratâ freight.

on the ground that the character of agent for the shipper is necessarily devolved on the master by the emergency; but the master cannot in such case be considered as the agent of the shipper for the purpose of receiving the damaged goods at the port of distress, dispensing with their further carriage, and thereby entitling the shipowner to *pro ratâ* freight. The presumption that he is agent for the shipper in such cases in selling the goods is incompatible with the presumption that he is also agent for the shipper in dispensing with their further carriage. "The agency of the master from necessity, arises from his total inability to carry the goods to the place of destination, which therefore dispenses with the performance of that primary duty altogether. On the other hand, the right to freight *pro ratâ* arises from the presumed waiver on the part of the shipper of the performance of a duty which the master (on behalf of the shipowner) was ready to execute."¹

Power of the
master to
send on the
cargo in
another ship.

The subject of which we now come to treat has been in some degree anticipated in our discussion of the continuing liability of the underwriter when goods are of necessity shifted into a different ship from that named in the policy.

We have seen that to repair the ship, if that be reasonable and practicable, is clearly his duty, in order to prosecute the remainder of the voyage.² He may retain the cargo till she is ready, unless, from the perishable nature thereof, that would be attended with serious injury.³ In that case,⁴ or in case the ship cannot be repaired at all, or not without unusual loss of time, he is at liberty to procure another ship and send on the cargo by it;⁵ this also he may do on the

¹ Per Parke, B., *Vlierboom v. Chapman*, 13 M. & W. 230, 239.

² Per Judges in *Benson v. Chapman*, 2 H. L. Cas. 696, 720; ante, p. 347.

³ The laws of Oleron, art. 4, 1 Pardees. 325; *Matthews v. Gibbs*,

30 L. J. (Q. B.) 55.

⁴ Per Lord Stowell, *The Gratitude, Mazzola*, 3 C. Rob. Ad. 240, 257, et seq.

⁵ *Shipton v. Thornton*, 9 A. & E. 314; *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55; *Luke v. Lyde*, 2 Burr.

high seas, if the opportunity of transhipment occurs, and the occasion for it be pressing, and he is not answerable in that case, although his own ship actually survive the voyage, and the other perish with the cargo.

"It never has been decided in this country whether, under any circumstances, he is bound to do this. By the Rhodian law,¹ it is left discretionary, as it is by the laws of Oleron,² and would appear to be so left by the ordinance of Wisby, did not a subsequent article, copied also into the Hanse Ordinance,³ bear testimony of a contrary disposition, thereby agreeing with the maritime law of Amsterdam.⁴ According to the interpretation put by Vinnius upon the Roman law, the master is thereby under no obligation to procure another ship when that by which he contracted to carry the goods is disabled.⁵ But the Antwerp⁶ and Rotterdam⁷ Ordinances, as translated by Magens, employ the strongest terms of obligation. The French law, though phrased in the clearest language on this point, is so framed as to leave the intention thereof in doubt, and the most distinguished jurists of that country divided in opinion. Si le capitaine est contraint de faire radoubler le navire pendant le voyage, l'affrèteur est tenu d'attendre, ou de payer le fret en entier. Dans le cas où le navire ne pourrait être radoubé, le capitaine est tenu d'en louer un autre. Si le capitaine n'a pu louer un autre navire, le fret n'est dû qu'à proportion de ce que le voyage est avancé.⁸ Looking at the first and third member of this provision, and the consequent effect upon freight which is operated by each, it is not unnatural to conclude that the

883, 887; *Lutwidge v. Grey*, *ibid.*; *Blasco v. Fletcher*, 32 L. J. (C. P.) 284; *The Hamburg*, 33 L. J. (Ad.) 116; 2 Moore, P. C., N. S. 289; *De Cuadra v. Swann*, 16 C. B., N. S. 772; *Kidston v. Empire Ins. Co.*, L. R., 1 C. P. 535; *Notara v. Henderson*, L. R., 5 Q. B. 346; 7 Q. B. 225.

¹ Chap. 42, 1 Pardess. 256.

² Art. 4, 1 Pardess. 325.

³ Ord. Wisby, art. 18, 1 Pardess. 472; Hans. Ord. (1614) t. 3, art. 17, 2 Pardess. 536.

⁴ Art. 17, 1 Pardess. 413.

⁵ Vinnius in *Peckium*, 285, 295.

⁶ Art. 3, 2 Magens, 14.

⁷ Art. 148, 2 Magens, 105.

⁸ Co. Com. art. 296, 391; Ord. 1681, liv. 3, t. 3, art. 11, 4 Pardess. 362.

second member is elliptically expressed, and should be construed as though followed by these words [ou de perdre le fret en entier]. Accordingly, it is the opinion of Valin,¹ and Pothier,² that he is no further bound to procure another vessel than by losing his freight if he omit to do so. Emerigon,³ however, followed by Pardessus⁴ and Boulay-Paty,⁵ maintains that, by the express language of the law and the nature of the trusts reposed in the master, it is his duty to hire another vessel, if it be possible, for the cargo, and that he is answerable in damages if he neglect it.”⁶

Statement by
Chancellor
Kent of the
law as to this
point in the
United States.

Chancellor Kent,⁷ stating the law of America, says:—
“‘In this country we have followed the doctrine of Emerigon and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo which is cast upon him from the necessity of the case, to act in the port of necessity for the best interests of all concerned, and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same, or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case.’”

The same learned jurist adds:—“He may tranship the cargo, if he has the means, or let it remain. He may bind it for repairs to the ship. He may sell part, or hypothecate the whole. If he hires another vessel for the completion of the voyage, he may charge the cargo with the increased freight, arising from the hire of the new ship: the master may also refuse to hire another vessel, and insist on repairing his own, and whether the freighter be bound to wait for the time to repair, or becomes entitled to his goods without any charge of freight, will depend upon circumstances.

¹ 1 Valin, 651.

² Charte-partie, no. 68.

³ 1 Emerig. 422, 423, 427.

⁴ 3 Pardess. Droit Com. no. 715,
and no. 644.

⁵ 3 Boulay-Paty, Droit Mar. 400-405.

⁶ The above paragraph is from
Maclachlan on Shipping, 399, 400.

⁷ 3 Kent, Com. 212.

What would be a reasonable time for the merchant to wait for the repairs cannot be defined, and must be governed by the facts applicable to the place and time, and to the nature and condition of the cargo. A cargo of a perishable nature may be so deteriorated as not to endure the delay for repairs, or to be too unfit and worthless to be carried on. The master is not bound to go to a distance to procure another vessel, or encounter serious impediments in the way of putting a cargo on board another vessel. His duty is only imperative when another vessel can be had in the same or in a contiguous port, or at one within a reasonable distance, and there be no great difficulties in the way of a safe re-shipment of the cargo."

In so far as the law of the United States imposes this as an imperative duty on the master, it goes far beyond the decisions in English law, if it does not also diverge from the course which they indicate. Lord Denman, indeed, in the case of *Shipton v. Thornton*,¹ intimates, that cases may arise in which "it will be the duty" of the master, as agent for both parties, to send on the goods, though at an increased freight. "In such a case," says his Lordship, "the freighter will be bound by the act of his agent, and of course be liable for the increased freight." But leaving peculiar cases out of account, legal opinion in this country seems to bear wholly on the side of Valin and Pothier, that whilst he is entitled to carry on the goods by another ship, and thereby earn the stipulated freight, he is at liberty to terminate the contract where his ship breaks down, without other consequences to himself or his owners than the loss of the whole of the contract freight.²

Whether, if he tranships the goods, he be the agent, in so acting, of his owners or of the freighters, is rather a question upon the facts in each case. It is a natural presumption, if the freight of the substituted ship be lower than the freight

Whose agent
he is when he
tranships.

¹ 9 A. & E. 337.

Ironworks Co., 1 Q. B. D. 613;

² See *Metcalfe v. The Britannia*

Hopper v. Burness, 1 C. P. D. 137.

of the original ship, that in hiring her he is agent for his owners, and that he is the agent for the freighters if he *bond fide* send on the goods at an increased freight.¹ Lord Denman, in the case already cited,² does not proceed to examine the question, whether such charge for increased freight is, in cases of insurance, to be regarded as an average loss by the perils insured against, and made good as such by the underwriter on the goods.

Is insurer
liable for
excess of
freight?

In France the law upon this point is, that such excess of freight by the substituted ship, together with all expenses of unloading, warehousing, and reloading the goods, shall be made good by the insurer up to the amount of his subscription.³

In the United States it has been decided that the underwriter on goods is not liable for the loss occasioned by such extra freight;⁴ at all events, unless there would otherwise have been a total loss of the goods.⁵

Duties of
master in
respect of
cargo by
English law.

In this country it has been held in respect of perishable cargo sustaining such damage as may, if not checked, go on increasing, that the master being in an intermediate port is not entitled to proceed on his voyage with such damaged cargo on board, the progress of the damage being unchecked, and that if he do so, he or his owners are liable for the further loss that ensues in consequence.⁶ If in such a case, instead of proceeding on his voyage with the damaged cargo, he incurs expense in checking the progress of the damage, he is entitled to be recouped by the owner of the goods, whose right of action over lies against the underwriter, under the *Sue and labour* clause of the policy,

Liability of
insurers.

¹ See *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55; *Shipton v. Thornton*, 9 A. & E. 314.

² *Shipton v. Thornton*, *supra*.

³ 1 Emerigon, c. xii. s. 16, p. 426; Code de Commerce, art. 392, 393; and see a very able statement of the French law as to this point in 2 Boulay-Paty, Droit Mar. tit. viii.

s. 8, *Du Fret en Cas de Radoub, et d'Innavigabilité du Navire*, pp. 398-416.

⁴ *Schulz v. Ohio Ins. Co.*, 1 Monros's Kentucky Rep. 339.

⁵ 2 Phillips, no. 1462; 3 Kent, Com. 212, note.

⁶ *Notara v. Henderson*, L. R., 5 Q. B. 346; 7 Q. B. 225.

notwithstanding the damage actually sustained does not reach the memorandum per-centage, provided it appear that but for such expenditure the damage would have increased until it had become a loss for which the insurer was answerable.¹ In short, if it appear that a loss which would have fallen on the insurer has been prevented or mitigated by the expenditure of money, the insurer is liable for the expense. Accordingly, where the vessel, in consequence of the perils insured against, was properly abandoned at an intermediate port, and the goods were transhipped and carried on to their destination at a heavy cost for incidental charges and for freight, the underwriter on freight was held liable for the whole of this expense, because thereby a total loss of the original freight was prevented.² Of course, to the extent that such expense is aggravated by fraud on the part of the master, neither freighter nor insurer is liable.³

On the other hand, the underwriters on ship are not entitled to the benefit of an advantageous transshipment after the wreck and abandonment of the original ship.⁴

In almost all cases of "loss or misfortune," the duty of acting for the benefit of all concerned, under the emergency, is thrown upon the master. If the casualty should prove to be of such a nature as to justify the assured in giving notice of abandonment, a question may, and frequently does, arise as to whose agent the master is in taking the steps which in his judgment are necessary under the circumstances. This is not the place for entering at any length into the discussion of the question, which will be more fully noticed when we come to treat of the subject of abandonment; it will be sufficient here to state the principle upon which it depends,

Of the powers and duties of the master in cases of abandonment.

¹ Per Willes, J., in *Kidston v. Empire Marine Ins. Co.*, L. R., 1 C. P. 535.

357.

³ *Matthews v. Gibbs*, 30 L. J. (Q. B.) 55.

² *Kidston v. Empire Marine Ins. Co.*, L. R., 1 C. P. 535; 2 C. P.

⁴ *Hickie v. Rodocanachi*, 4 H. & N. 455; 28 L. J. (Ex.) 273.

which is, that as the effect of a notice of abandonment, if accepted, or if made on good grounds, whether accepted or not, is to vest the ownership of the abandoned property in the underwriter from the moment of the loss, the master will be considered as the agent of the underwriter in all acts done by him from that time, within the scope of the authority given to him by the policy, "to sue, labour, and travel," for "the defence, safeguard, and recovery of the subject insured."¹

If no notice of abandonment is given, or none given within due and proper time, the master in all that he does, within the scope of his duty, is the agent of the assured.²

¹ See the judgment in *Fleming v. v. Leduc*, L. R., 6 P. C. 224.
Smith, 1 H. L. Cas. 513; and per
Privy Council in *Provincial Ins. Co.*

² *Fleming v. Smith*, *supra*.

CHAPTER VIII.

DESIGNATION OF THE RISK IN THE POLICY.

Voyage policy - - - 365 what it is - - - 365 description of voyage insured 368 Time policy - - - 371 what it is - - - 371		limits of the risk - - - 371 Mixed policy - - - 373 what it is - - - 373 construction and effect of - 373 foreign law of - - - 375
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USUALLY the risk which is undertaken by the insurer is defined by certain limits of time or certain points of locality.¹ When the risk is limited by time, the policy is called a time policy ; when by local termini, it is called a voyage policy.

In voyage policies, which we shall consider first, the *terminus a quo*, or place at which the risk commences, is usually, in the common policies on ship, the port of departure ;—in the common policies on goods, it is usually the port of loading, which frequently, but not necessarily, is the same place with the port of departure. The *terminus ad quem*, or point at which the risk ends, is the port of the ship's destination, or the port or ports of the cargo's discharge.

That which is limited or described in the policy, by these termini, is the voyage insured (*viaggium*),—a technical term, which must be carefully distinguished from the actual voyage or course steered by the ship (*iter navis*).² The distinction is important.

The voyage insured (*viaggium*) is a transit at sea from the *terminus a quo* to the *terminus ad quem* in a prescribed course

¹ 2 Emerigon, c. xiii. 39 ; 2 Bencke, System des Assecuranz, c. viii. 203, ed. 1807.

² Casaregis, Disc. 67, no. 31, as cited 2 Emerigon, c. xiii. s. 5, p. 60.

The voyage
of the ship.

of navigation (*iter viaggi*), which is never set out in any policy, but virtually forms part of all policies, and is as binding on the parties thereto equally as though it were minutely detailed. The voyage of the ship (*iter navis*) is the course of navigation on and in which the ship actually sails. If the ship, in fact, sails in the prescribed course from the *terminus a quo* to the *terminus ad quem*, the voyage of the ship and the voyage described in the policy are identical, and the underwriter has no defence upon this ground.

Deviation.

If the ship, without entirely abandoning the prosecution of the voyage described in the policy (*viaggium*), yet voluntarily, and without justifying cause, depart from the prescribed course of that voyage (*iter viaggi*), this is a deviation, and the underwriter is not liable for any loss that occurs after the point (frequently called the *dividing point*) at which the ship first quits the prescribed course.

Abandonment
or change of
voyage.

If the ship either originally sail on a different voyage from that described in the policy, or if, after sailing, she entirely abandon all intention of prosecuting the voyage described in the policy, this is a change or abandonment of voyage, which avoids the policy from the moment the intention of so abandoning it is definitely formed; for it is an elementary principle in this branch of insurance law, that the underwriter cannot be liable for any loss which does not take place in the course of prosecuting the very voyage described in the policy.¹

Illustrations.

The following simple illustrations may serve to place these distinctions in a clearer point of view:—

The voyage
insured—and
the voyage of
the ship.

1. As to the voyage insured, and the voyage of the ship:—Suppose the ship to sail under a charter-party, on a voyage from London to Sydney and back; a merchant who expects goods to be sent by her on her homeward voyage from Sydney to London, effects a policy on them on board the ship for a voyage “at and from Sydney to London;”—in this case, the voyage of the ship is the round voyage

¹ Rooccus, no. 18, cited 2 Emerigon, c. xiii. p. 39.

from London to Sydney and back, that is out and home; the voyage insured, or rather (for this is the more accurate mode of expression) the voyage on which the subject is insured, is only the home voyage at and from Sydney to London.

2. As to change of voyage and deviation:—A ship insured on a voyage from London to Cadiz, sails from London with the intention of proceeding, not to Cadiz, but to Jamaica: this is a change of voyage: and it is equally so if, after sailing some distance with an intention of proceeding to Cadiz, the assured changes that intention, and resolves to proceed to Jamaica.

Deviation—
and change
of voyage.

In either case, as the voyage insured ceases to exist directly the purpose of prosecuting it is finally abandoned, any loss accruing afterwards does not take place in the course of the voyage described in the policy, and, consequently, not under those conditions on which the underwriter agreed to be responsible; the policy, therefore, as to him, is a void contract from that time.¹ Although, in the case supposed, the loss takes place while the ship is still in the course that leads indifferently to the original *terminus ad quem* (Cadiz), and the substituted port of destination (Jamaica), yet the underwriter is equally freed from liability, for the voyage insured is broken up, not by altering its course, but by altering its termini.²

Again, supposing the ship to have been insured (say from London to Jamaica), and the prescribed or customary course of such voyage to be to sail to the south of St. Domingo, instead of which the ship, without any clause in the policy

¹ 3 Boulay-Paty, Droit Mar. tit. x. s. 9, p. 415.

² Si avant le départ, la destination était changée, le voyage serait rompu et l'assurance serait nulle,—etiamsi intra limites itineris destinati navis se contineat, dit Casaregis, Disc. 67, no. 24,—Emerigon, c. xiii. s. 11, vol. ii. p. 82; confirmed by Woolridge v. Boydell, 1 Dougl. 16; Way v. Modi-

gliani, 2 T. R. 30.

The citation here made from Emerigon is in a section devoted to the discussion of *voyage rompu avant le départ*. We shall see hereafter (c. x. post) that in a different section this learned French author discusses *voyage changé*, and that Arnould cites from both sections indifferently.

permitting her to do so, or without any necessity, or justifying excuse, sails to the north of that island: this is a deviation. Here the course actually taken by the ship (*iter navis*) differs from the prescribed course of the voyage insured (*iter viaggi*); the risk run is different from that which the underwriter agreed to take upon himself; and he is, therefore, liable for no loss that takes place after the ship has passed the dividing point at which the track to Jamaica by the south of St. Domingo branches off from that by the north.¹

Description of
the voyage
insured in the
policy.

The voyage insured must be accurately described in a voyage policy; that is, the local limits of the risk, the *terminus a quo*, or port where the voyage is to commence; and the *terminus ad quem*, or port where it is to conclude, must be each of them specified in the policy, which would be vitiated by any material failure in this respect.² If the *terminus ad quem* or port of ultimate destination be left in blank, though this were done for the purpose of deceiving the enemy, and private instructions given to the captain as to the port for which the ship was really destined, the policy is nevertheless void.³

By termini.

Limits of
terminus.

Where there is any doubt as to the precise mercantile limits of any place named in the policy as one of the termini of the voyage, such doubt must be cleared up by the evidence of mercantile men. For instance, whether the Gulf of Finland is, by mercantile usage, deemed to be within the Baltic;⁴ or whether the Mauritius, although regarded by geographers as belonging to Africa, be yet, in

¹ The whole subject of deviation and change of voyage remains to be considered more at length hereafter; meanwhile I cannot forbear directing the attention of the student to the thirteenth chapter of Emerigon's great work, an admirably arranged magazine of legal learning and accurate thought; Boulay-Paty, in his

Droit Mar. vol. iii. tit. x. s. 9, has done little more than copy his distinguished predecessor.

² Uhde v. Walters, 3 Camp. 16.

³ 30 Vict. c. 23, s. 7; Molloy, book ii. c. 7, s. 14, cited 1 Marshall on Ins. 328.

⁴ Uhde v. Walters, 3 Camp. 16.

the common acceptation of mercantile men, one of the East India Islands.¹

This description of the voyage insured by its termini is all that is necessary in the policy. More is not requisite, or ever attempted; the track which the ship ought to take, being fixed by general usage, is received as familiar to all mercantile men, and is held as binding upon the parties to the policy as though it were therein fully described in detail. All the more need is there that the termini of the voyage insured be clearly specified in the policy.

Beside the termini, however, of the proposed voyage, if it be desired that the ship should have the power of putting into intermediate ports or places, the permission to do so must be clearly expressed in the policy by a clause setting out the ports where and the purposes for which the ship is to have this power, together with the order in which they are to be visited. Of these clauses and their construction we shall treat at large elsewhere.

As appears by the common printed form of policy, the voyage insured is in this country generally made to commence, not simply "from," but "at and from" the *terminus a quo*. The reason for this is, that, under an insurance simply *from* the *terminus a quo*, the voyage insured, and consequently the risk, does not commence until the ship actually sails on her voyage *from* that port; whereas, under the mode of insurance commonly adopted, by virtue of the word *at* the ship is protected during the whole time that she is in the port or harbour of the *terminus a quo* preparing for the voyage insured.²

Ships are very frequently insured in one policy and at one fixed premium, for the round voyage out and home. In

¹ *Robertson v. Clarke*, 1 Bing. 445; see note at the end of the report, p. 451, *ibid*.

² *Motteux v. London Ass. Co.*, 1 Atkyns, 545; *Forbes v. Wilson*, 1 Marshall, Ins. 148.

such cases, the form generally adopted is to insure "at and from" the home port of loading "to" the out port of discharge, "and at and from" such out port (naming it), or "at and from thence," back again to the home port or any other port of discharge which the parties may agree to name.

When the ship is thus insured for a voyage out and home, although she makes two separate passages (*itineræ*),—from the home to the out port and then back again,—yet the voyage insured (*viaggiū*) is one and indivisible, and the underwriter is responsible for any loss that may happen in the whole course of its duration. The voyage insured is one, though the passages made by the ship are several.

This principle, which is incontestably established in the law of Marine Insurance, is thus expressed by Casaregis :—*Falsum est omnino in casu nostro quod itus et reditus considerari debent pro diversis viaggiis, sed pro unicâ tantum navigatione vel viaggio. Quia viaggiū vel navigatio, cum sit nomen juris ac universale, potest complecti plura itinera.*¹ This is so, moreover, however complicated the voyage may be by liberty to touch and stay at intermediate ports, or by being broken up into a variety of successive stages.² A ship was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back again to Honfleur," at a premium of eleven per cent., and Lord Mansfield and the Court of King's Bench determined, on great consideration, that as the premium here was entire and indivisible, so it was one voyage and one entire risk.³

¹ Disc. 67, no. 28, cited by Emerigon, c. xiii. s. 3, vol. ii. p. 53. For an illustration of this in our own jurisprudence, see *Bermon v. Woodbridge*, 2 Dougl. 781.

² En matière d'assurance toute navigation assurée, quelque compli-

quée qu'elle soit, constitue un voyage simple : on considère moins le voyage du navire que celui qui est déterminé par la police; 2 Emerigon, c. xiii. s. 3, p. 52.

³ *Bermon v. Woodbridge*, 2 Dougl. 781.

When the ship is to be employed on cruising, coasting, or fishing voyages, or on other adventures, which, from their nature, it would be inconvenient, or even impossible, to designate by local *termini*, it is very usual to limit the risk to a certain fixed period of time specified in the policy, which is then called a time policy.¹ It must be added, however, that in these words we have rather described the occasions in which this policy originated than the present use of it, which is now much more general and still increasing.

Time policy.
What it is.

In such policies the risk insured is entirely independent of the voyage of the ship (*iter navis*),² and the policy covers any voyage whatever which the ship may make, and any loss or damage she may sustain by the perils insured against within the space of time limited in the policy.³ This assumes, however, that the policy contains no exceptions of certain geographical limits for certain seasons of the year, a feature now become very common; for in that case a loss within the excepted limits of time and space, would not be covered by the policy.⁴

The two extremes of the time are the *termini* of the risk; and the adventure begins and ends with the term, wherever the ship may then happen to be, and whether the object of the voyage be then accomplished or not.⁵ The risk once begun under a time policy, necessarily ceases when the time limited in the policy comes to an end.⁶

Beginning,
continuance,
and cessation
of the risk.

¹ 2 Emerigon, c. viii. s. 1, p. 41;
² Benecke, System des Assecuranz,
442.

² 2 Benecke, 446.

³ 3 Kent, Com. 307, note.

⁴ Birrell v. Dryer, 9 App. Cas. 345.

⁵ Casaregis, Disc. lxvii. no. 31,
cited 2 Emerigon, c. xiii. s. 1, p. 42.
Lapso tempore extincta est materia

obligationis et consequenter obligatio, quia post tempus, jam alia est materia, alia res; 3 Dumoulin, 283, cited 4 Boulay-Paty, Droit. Mar. 170.

⁶ Il suffit que le risque ait commencé pour qu'il finisse au tems prescrit; 2 Emerigon, c. xiii. s. 1, p. 41.

From the instant that the policy attaches, the insurer's right to the full premium is complete, and the right of the assured to a full indemnification in case of loss.¹ Thenceforth there is no suspension of the risk, whether the ship be at sea or in port; it continues to run until the expiration of the period insured.²

May be retrospective.

A time policy, like a voyage policy, may be effected retrospectively if it contain the clause "lost or not lost;"³ as where a policy was effected in August, 1807, "to commence from 1st August, 1806," on a ship engaged in the Southern whale fishery, which had sailed on her voyage in 1805.⁴

On general principles, it is clear that the underwriters on a time policy ought to be liable for any loss which happens within the limits of the time. But it is supposed to have been laid down in *Meretony v. Dunlope* that where damage is caused within the limits of the time, and the extent of it not ascertained till afterwards, the underwriter is not liable. The case, as shortly stated by Willes, J., was that of an insurance for six months on a ship which received her death-wound three days before the expiration of the period, but was kept afloat by pumping till three days after it had expired; the verdict for the underwriters was confirmed by the Court.⁵ In *Knight v. Faith*,⁶ however, which raised the same point for decision in more recent times, Lord Campbell, in delivering judgment, intimated considerable doubt whether the doctrine supposed to be established by *Meretony v. Dunlope* was ever laid down by Lord Mansfield, and laid down what the Court deemed to be the correct doctrine thus:—"If a ship insured for time, during the time receive damage from the perils of the seas, though the amount thereof be not ascertained till the expiration of that time,

Supposed doctrine of *Meretony v. Dunlope* overruled by *Knight v. Faith*.

¹ *Tyrie v. Fletcher*, 2 Cowp. 666; *Loraine v. Thomlinson*, 2 Dougl. 585.

² 2 *Emerigon*, c. xiii. s. 1, p. 41: see to the same effect, *Syers v. Bridge*, 2 Dougl. 527.

³ These words are not deemed in-

dispensable; ante, p. 235.

⁴ *Hucks v. Thornton*, Holt's N. P. 30.

⁵ *Meretony v. Dunlope*, stated by Willes, J., in giving judgment in *Lockyer v. Offley*, 1 T. R. 260.

⁶ *Knight v. Faith*, 15 Q. B. 649.

and she is kept afloat till then, upon the assured taking proper steps, there does not appear any good reason why they may not, according to the facts, proceed against the underwriters either for a total or for a partial loss."¹

England appears to be the only commercial state in which any restriction is placed on the duration of time policies. In France,² Hamburg,³ Sweden,⁴ and Prussia,⁵ marine insurances on time are expressly allowed without any limitation as to their extent; and the law is the same in the United States of America.⁶

Limited in England to one year.

In England the law is, that "no policy shall be made for any time exceeding twelve months, and every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes."⁷

The policies we have just been considering are purely time policies, in form and in effect, the limits of the risk being defined in the policy by points of time only, without any designation of local termini at all; policies, however, are sometimes, though not very frequently, made, in which not only the time is specified for which the risk is limited, but the voyage also is described by its local termini.⁸ As, for instance, "at and from London to Cadiz for six months," or "from the 1st of January, 1885, to the 1st of June, 1885, at and from Bristol to Marseilles," &c., or "from the 1st of January, 1870, at and from Liverpool to New York."

Mixed policies

These policies are neither time nor voyage policies, but partake of the nature of both, and, for the sake of convenience, may be called mixed policies. They are time

Construction and effect of such mixed policies.

¹ 15 Q. B. 667.

German Code, art. 834.

² Ord. Mar., liv. 3, t. vi. art. 34; Co. Com. 363.

⁶ 1 Phillips, Ins. no. 949, note.

³ Insurance Ordinance, tit. v. art. 15.

⁷ 30 Vict. c. 23, s. 8; Lishman v. Northern Marit. Ins. Co., L. R., 8 C. P. 216.

⁴ Insurance Code, art. 6, s. 15.

⁸ Way v. Modigliani, 2 T. R. 30;

⁵ Prussian Code, s. 2172-2176;

Robertson v. French, 4 East, 130.

policies in this, that the underwriter is not liable for any loss to the subject of insurance, unless it occur within the limits of the time specified in the policy: and they are voyage policies in this, that the underwriter is not liable for any loss unless the ship originally sailed on the voyage described in the policy, and at the time of the loss be sailing on the prescribed course between the termini of such voyage.

Whether
the policy
attaches.

Thus, as we have already seen, where a Newfoundland ship was insured "at and from the 20th of October, from any ports in Newfoundland to Falmouth, or her port or ports of discharge in England;" it was held, that although under this policy the ship need not have been in any port in Newfoundland on the 20th of October, yet, in order to make the policy attach at all, the ship must have originally sailed on the voyage insured, and that as in this case she had not done so, the assured could not recover, though the loss took place after the 20th of October, and when the ship had already got into the course of the voyage described in the policy.¹

So it has been held in the United States, where a brig was insured "from Calais, in Maine, on the 16th day of July, to, at, and from all ports to which she might proceed in the coasting trade for six months," that although the brig was not at Calais on the 16th July, but had been there subsequently within the six months, the policy attached on the 16th July; "for it was the clear intent of the parties to insure on time, without regard to place where the vessel might then be, but only with regard to the employment in which she was engaged, viz., the coasting trade."²

So where insurance was effected on a ship for one year "at and from Boston to Charlestown;" and it appeared that the ship, covered by a prior policy on time, had sailed from Boston before such prior policy had expired, the second

¹ *Way v. Modigliani*, 2 T. Rep. 30.

Pickering's R. 389, cited 1 Phillips,

² *Martin v. Fishing Ins. Co.*, 20

Ins. no. 928.

policy was held to attach while the ship was at sea on the voyage, immediately upon the expiration of the first.¹

A policy was effected on ship, "to, at, and from one or more ports in the globe, for one year, commencing the risk at Barbadoes the 7th of December, 1810, to continue till the vessel should be arrived and moored at anchor twenty-four hours in safety within the year aforesaid." The vessel was not at Barbadoes, as supposed by the policy, but the Court said, her being so was immaterial, and that the risk would end with the year without any regard to her being in any port, either at that time or before; the beginning, duration, and end of the risk being well enough described, without any regard to the place where it was to commence, or to the vessel being safe in port.²

A policy "at and from the Port of Pomaroa to Newcastle, and for fifteen days whilst there after arrival," was held to be a mixed policy, and consequently that a loss which happened after the voyage was completed, but within the fifteen days, and while the ship was within the port of Newcastle, was covered by it.³

Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination, and been there moored at anchor, the policy is chargeable with duty as a policy for a voyage, and also with duty as a policy for time.⁴ Stamp duty.

The law of France, under the Ordonnance of 1681, differed from the maritime law of almost all other countries,⁵ in providing that under policies in this form, if the voyage were not completed at the expiration of the time, the risk should still continue, the underwriter receiving an increase Law of France.

¹ See 1 Phillips on Ins. no. 928.

the judgment below, *ibid.* 8.

² *Manley v. United Marine and Fire Ins. Co.*, 9 Mass. R. 85, cited 1 Phillips, no. 928.

⁴ 30 Vict. c. 23, s. 11; as amended by 47 & 48 Vict. c. 62, s. 8.

³ *Gambles v. Ocean Mar. Ins. Co. of Bombay*, 1 Ex. Div. 141, reversing

⁵ 2 Benecke, *System des Assecuranz*, 445.

of premium in proportion to the increased duration of the risk.¹

This provision, however, of the former law was designedly omitted from the Code de Commerce, on the ground, as stated by the codification committee, that to compel the underwriter to continue the risk beyond the limit of time fixed in the policy would be unjust, because the only meaning of its insertion must be to exempt him from liability beyond a certain fixed period.²

¹ Ord. liv. 3, tit. vi. art. 35.

² 4 Boulay-Paty, Droit Mar. 172, 173. Boulay-Paty himself prefers the provisions of the old law, and considers it advisable to introduce a special clause into all such policies,

that the risk shall continue after the expiration of the time at a proportionate increase of premium. He says such policies are of frequent use in the Mediterranean and Levant trade.

CHAPTER IX.

DURATION OF THE RISK UNDER THE POLICY.

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commencement of risk	-	-	-	378	commencement of risk	-	-	432
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The clause describing the voyage by its termini is distinct in our English policies from that which defines the commencement, continuance, and end of the risk. This latter clause, upon the construction of which the nature of the contract between the parties so materially depends, is in the statutory form of policy as follows :—"Beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship upon the said ship, &c. , and shall so continue and endure, during her abode there, upon the said ship, &c., and further, until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at , upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

Duration
clause.

As there are many decisions in our books on the construction of this clause, and as the duration of the risk varies upon the different subjects of insurance, it will conduce to clearness if we consider the subject of this chapter in relation to—1. The goods; 2. The ship; and 3. The freight.

Duration of
the risk on
goods.

Commence-
ment of risk.

In considering the duration of the risk on goods, we begin with the commencement of such risk. The policy runs,—“Beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship.”

The common form of policy in this country, from which these words are taken, affords no protection against those dangers to which the goods are exposed in being carried in boats or lighters from the quays or wharfs of the port of loading to the ship's side. In this respect our law differs from that of almost all the Continental states, which either decree by their ordinances, or stipulate in their policies, that the risk of the underwriters on goods shall commence directly the goods leave the shore, in order to be loaded on board the ship.¹

There is no bar, however, in this country against protecting goods during this transit from quay to ship by an express

¹ Thus, the law of Hamburg provides that the risk on goods shall begin immediately from the time the goods leave the shore (*da das Gut vom Lande schiedet*), and continue till they are landed again in safety at their place of destination. (*Assecuranz-ordnung*, tit. v. art. 11, 13.) The insurance regulations of 1847 add:—“The insurer is not responsible for loss caused by any mode of conveying goods from ship to shore, not usual at the port of discharge, unless informed that it will be resorted to.” (1 *Nolte's Benecke*, 643.) By the Antwerp policies, “The risk on merchandise begins from the moment they are loaded in the ship, or in lighters to convey them there, and continues till landed at the port of discharge.” (*Vaucher, Guide*, 16.) The ordinances of Amsterdam (art. 5), of Rotterdam (art. 46, 47), and of Spain

(*Code*, art. 835, 871), go even farther, and declare that the risk on goods shall commence from the time they are brought down to the quay or wharf in order to be loaded on board. The Stockholm policies agree with these latter ordinances. (See *Vaucher, Guide*, 172.) The Prussian code (*Tit. Versicherungen*, § 2184, 2185) makes the risk commence from the loading on board of ship, or the lighters that are to convey them thither; and the French *Code de Com.* (art. 328, 341) contains exactly the same provision: and see 3 *Boulay-Paty, Droit Mar.* 418-420; see also 2 *Emerigon*, c. xiii. s. 2, p. 48; and 2 *Benecke, des Assecuranz*, p. 205; 1 *Nolte's ed.* 641-646. By the German code the insurers undertake the risk of lighters when the use of such craft is in accordance with the custom of the port; art. 828.

clause in the policy, properly framed for the purpose. Thus, in a policy on goods at and from St. Petersburg to London there was this clause: "Beginning the adventure on the said goods from and immediately following the loading thereof on board boats at St. Petersburg," and it was not disputed that under it the risk on goods commenced directly they were put on board boats at St. Petersburg to be loaded (in the usual course of trade there) on board the ship at Cronstadt.¹

The clause in the policy runs,—“From the loading thereof on board the said ship at,” &c. Upon these words it has been frequently decided that a policy on goods for a voyage “at and from” a specified terminus in which the risk is expressed to begin “from the loading thereof on board the ship” in the common form, will attach only on goods loaded on board at the very place named as the *terminus a quo* of the voyage.² It is so held although it appear from extrinsic evidence that the underwriters knew the goods had, in fact, been loaded on board prior to the ship’s arrival at the place specified as the *terminus a quo* of the voyage, and that it was the intention of the assured by the policy to protect the goods so loaded elsewhere.³ Most of the cases arose during the wars of the French Revolution, when, in consequence of Napoleon’s Berlin and Milan decrees, goods really

From the port
of loading.

¹ *Hurry v. Royal Exch. Ass. Co.*, 2 B. & P. 430; see per Heath, J., *ibid.* 435. The general law of Russia is (like our own), that the underwriter on goods shall not be liable for any loss in the course of transporting the goods from shore to ship, except by virtue of a special clause in the policy. Imperial Shipping Ordinance of Russia, c. 10, s. 183; Nolte’s *Benecke*, vol. i. p. 646.

² *Robertson v. French*, 4 East, 130; *Spitta v. Woodman*, 2 Taunt. 416; *Horneyer v. Lushington*, 15 East, 46; *Langhorn v. Hardy*, 4 Taunt. 628;

Mellish v. Andrews, 2 M. & Sel. 106; *Rickman v. Carstairs*, 5 B. & Ad. 651. These decisions have not met with approval recently, see Carr *v. Montefiore*, *post*, p. 381.

³ Per Bayley, J., in *Gladstone v. Clay*, 1 M. & Sel. 423; per Lord Denman, in *Rickman v. Carstairs*, 5 B. & Ad. 651, 663; and see the facts of *Robertson v. French*, 4 East, 130; *Spitta v. Woodman*, 2 Taunt. 416; *Langhorn v. Hardy*, 4 Taunt. 628, in all which it plainly appeared that the underwriters knew the goods had been previously loaded.

shipped in this country were insured as if shipped at some Baltic port.

Spitta v.
Woodman.

Thus, to take one case as an illustration of many; a cargo insured "at and from Gottenburg to the ship's port or ports of discharge in the Baltic," with the usual clause, "beginning the adventure on the said goods from the loading thereof on board the said ship," had been loaded at London, carried to Gottenburg, and without being taken out and reloaded there, was proceeding thence when it was captured. Although the policy on which the action was brought was in continuance of another policy from London to Gottenburg, effected with the same underwriter, as he well knew, the Court felt bound by the express words of the policy to hold that as the goods had been loaded on board, not at Gottenburg, the *terminus a quo* of the voyage insured, but at a previous port, the policy never attached at all, and that the assured could recover nothing.¹

In this case the risk was on the goods "from the loading thereof on board the ship," without saying where; of course, if the risk is from their being "loaded on board the ship at" the *terminus a quo* or other place named, the reason for a strict construction of the policy is still more cogent.²

Rickman v.
Carstairs.

The rule of construction was not relaxed in the more recent case of *Rickman v. Carstairs*. That was an action on a policy on ship and goods for a homeward voyage "at and from the coast of Africa" to the ship's port of discharge in the United Kingdom, beginning the adventure on the goods "from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa;" and it was held by Lord Denman and the Court of King's Bench, that, in the absence of anything upon the face of the instrument

¹ *Spitta v. Woodman*, 2 Taunt. 416; *S. C.*, 16 East, 188, note. See also *Mellish v. Allnutt*, 2 M. & Sel. 106, where the risk was also made to begin "from the loading on board ship," without more.

² See accordingly *Robertson v.*

French, 4 East, 130; *Horneyer v. Lushington*, 15 East, 46; *Langhorn v. Hardy*, 4 Taunt. 628, in all of which the risk was made to commence from the loading on board at a place named.

to show the contrary, this policy did not attach on part of the outward cargo, loaded at her port of departure in this country, although still remaining on board on the coast of Africa more than twenty-four hours after her arrival there and at the time of the loss. "It appears very likely," said Lord Denman, "that the assured intended by this policy to insure both the outward and homeward cargo: unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of the construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."¹

The application of this rule to some of these cases has lately been the subject of severe animadversion. "In the several Gottenburg cases it seems to me," says Erle, C. J.,² "that a construction was put on the policies so as to defeat the intention of the parties." Cockburn, C. J., in the same case below,³ expresses a hope that it might be brought under the consideration of the highest Court of Appeal. And Lord Ellenborough, C. J., himself an assisting party in the establishment of this construction, says of it, "A very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in *Spitta v. Woodman*. But if there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that construction."⁴

The Courts take every opportunity afforded by the parties of modifying the strict rule.

Accordingly, where a policy on American produce "at and from Gottenburg to any ports in the Baltic, beginning the adventure on the goods from the loading thereof on board the ship," was expressed to be "in continuation of five other policies," and these were on the same cargo for a voyage

Bell v. Hobson.

¹ *Rickman v. Carstairs*, 5 B. & Ad. 651, 662, 663.

³ *Id.*, *ibid.* 57; 5 B. & S. 408, 425.

² *Carr & Josling v. Montefiore*, 33 L. J. (Q. B.) 256.

⁴ *Bell v. Hobson*, 16 East, 240, 248; S. C., 3 Camp. 273.

from Norfolk in Virginia to Gottenburg, Lord Ellenborough held that the policy attached.¹

So a policy of re-insurance was in such terms as would have brought it within the rule in *Spitta v. Woodman*; but it was expressly made "subject to all clauses and conditions of the original policy," and as the original policy, being upon goods embarked in the barter trade on a voyage to Africa and back, stipulated that outward cargo should be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge, it was held that the policy of re-insurance was qualified by the terms of the original policy, and had attached on the goods, although not loaded on the coast of Africa, but at Liverpool.²

Gladstone v.
Clay.

Lord Ellenborough had, in *Bell v. Hobson*, suggested the introduction of the words "wheresoever loaded," as a way of adapting the policy to the purposes of the parties. Accordingly, a policy on cargo for a homeward voyage "at and from Pernambuco to Maranh, and at and from thence to Liverpool,"—"beginning the adventure on the said goods from the loading thereof on board the said ship *wheresoever*," was held, in virtue of this word *wheresoever*, to protect a portion of the outward cargo loaded at Liverpool, and still on board at the time of the loss while on her way from Pernambuco to Maranh, not having found a market at Pernambuco.³

Constructive
loading.

Another instance of the disposition of the Courts to seize any opportunity of relieving the parties against the effect of their own negligence and the above general rule of construction, in favour of their intention, is where there is such a landing and re-loading, or this and such a new direction and destination given to the adventure at the intermediate port as may be construed a "loading on board" at that port within the meaning of the policy.

¹ *Bell v. Hobson*, 16 East, 240; 3 7 Q. B. 580.

Camp. 272; *S. C.* at N. P.

³ *Gladstone v. Clay*, 1 M. & Sel.

² *Joyce v. Realm Ins. Co., L. R.*, 418.

Thus, under a policy on ship and goods "at and from Landserona to Wolgast," beginning the risk on the goods "from the loading on board the ship," the goods, though previously loaded on board at Gottenburg, were partly taken out of the hold on the ship's arrival at Landserona, and landed on the quay there, so as to enable the custom-house officers to ascertain the quality of the whole cargo and adjust the duties on it, after which they were reloaded on board, Lord Ellenborough held that this unloading and reloading distinguished the case from that of *Spitta v. Woodman*, and was sufficient to make the policy attach on the goods at and from Landserona.¹

Nonnen v. Kettlewell.

Accordingly, under a similar policy on goods "from a port or ports in the River Plate," where so much of the cargo was landed at Monte Video as to allow of repairs to the fore-peak of the ship and then reloaded, it was held that this satisfied the clause "from the loading thereof on board," although it was a cargo of guano that had been originally shipped at Liones Island in Patagonia. Cockburn, C. J., however, said he relied more upon the additional fact that at Monte Video after the repairs, both ship and cargo had changed hands by sale, and a new destination was given to the adventure by the purchasers.²

Carr and Josling v. Montefiore.

In the United States, where the construction put upon this clause is as strict as in our own Courts, it has been held that merely hoisting the goods from the hold to the ship's deck at the *terminus a quo* of the voyage insured, in order to make room for other goods there taken in, and then re-stowing them, is not equivalent to a loading on board at such terminus so as to make the policy attach on those goods.³

In the United States.

¹ *Nonnen v. Kettlewell*, 16 East, 176. In this case it was objected that the cargo had not been so far unloaded as to ascertain what amount of sea damage it had sustained on the voyage from its prior port of loading; but Lord Ellenborough held that as the goods were "warranted free of

average," the objection, at all events in this case, would not apply.

² *Carr & Josling v. Montefiore*, 33 L. J. (Q. B.) 57; affirmed (in error), *ibid.* 256; 5 B. & S. 408, 425.

³ *Murray v. Columbian Ins. Co.*, 11 Johnson, 302, cited 1 Phillips, Ins. no. 939.

Mr. Phillips seems to think that if the goods in this case had been landed on the wharf and then taken on board again, the Court would have construed it a loading on board within the meaning of the policy.¹

Rule not applicable where liberty to touch, stay, and trade.

The strict rule of construction does not prevail where, the voyage being a trading or bartering voyage, the policy contains a liberty "to touch, stay, trade, &c." or any other clause of that kind; for in such cases it is obvious, on the face of the policy itself, that it must have been contemplated by the parties that other goods would be put on board in the course of the voyage than those loaded at the port of departure, and that they intended to protect such goods by the policy. Wherever, therefore, it can fairly be deduced, from the whole construction of the policy, that the parties contemplated loading, unloading, bartering, or trading with goods at any intermediate ports in the course of the voyage insured, the policy attaches, not only on goods loaded on board at the port of departure, but also on those loaded on board at any of the ports where the ship is empowered to touch and trade under the terms of the policy, or where, upon a true construction of the whole instrument, it must be presumed that such a loading was contemplated.²

Violett v. Allnutt.

Barclay v. Stirling

Thus, if a ship has liberty by such a policy to touch at a specified port, it attaches on goods loaded on board at that port, in order to complete the cargo.³ So, a freight policy with liberty "to call, exchange, or take on board goods" at any West India island between the original port of loading and the ultimate port of discharge, attached on fresh goods loaded on board the ship at a port of distress, in order to replace part of the original cargo, which had been washed

¹ 1 Phillips, Ins. no. 939.

² 2 Emerigon, c. xiii. s. 8, p. 72; Pothier d'Assurance, no. 63; 2 Valin, liv. 3, tit. vi. art. 27, p. 78, establish the principle; *Violett v. Allnutt*, 3 Taunt. 419; *Grant v. Delacour*, 1

Taunt. 466; *Grant v. Paxton*, *ibid* 463; *Barclay v. Stirling*, 5 M. & Sel 6; *Hunter v. Leathley*, 10 B. & Cr 858; affirmed (in error), 7 Bing. 517

³ *Violett v. Allnutt*, 3 Taunt. 419

out of her as the ship lay ashore.¹ So, in the case of *Hunter v. Leathley*, the policy attached on goods shipped on board to complete the cargo at a port lying diametrically out of the course from the original port of loading to the ultimate ports of discharge; it was not named in the policy, but yet was embraced within its very extensive terms. Lord Tenterden intimated in the same case, that in policies on trading voyages all places mentioned after the words with "liberty to touch, &c.," may be considered as loading ports, ports, that is, at which, if goods are loaded, they will be protected by the policy."²

An East India captain, to protect his interest in the adventure out and home, effected a policy "on goods as interest should appear, at and from London to all ports or places on this or the other side of the Cape of Good Hope forwards and backwards at sea, at all times, on all services, and all ports and places, until the ship's arrival back again to her last station of discharge at Blackwall or Deptford—beginning the adventure on the said goods from the loading thereof on board the said ship at London." The Court considering that these voyages were for the purposes of trading and barter, held, that the policy attached upon any goods which the captain might acquire by trading with his outfit in the course of the voyage described in the policy, wherever they might be loaded on board.³

The same captain, to protect his interest for the homeward voyage, effected an insurance "on goods at and from China to all or any other ports or places whatsoever, or wheresoever, in the East Indies, Persia, or elsewhere beyond the Cape of Good Hope, in port or at sea, in all places, at all times, and in all services, until the ship's safe arrival in London—beginning the adventure upon the said goods from the loading thereof on board at China;—with liberty for the ship in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, for any purposes

¹ *Barclay v. Stirling*, 5 M. & Sel. 6. 858; (in error) 7 Bing. 517.

² *Hunter v. Leathley*, 10 B. & Cr.

³ *Grant v. Delacour*, 1 Taunt. 466.

whatsoever, without being deemed a deviation." With a cargo of tea originally loaded on board at China for the homeward voyage, the ship was obliged to put into Bombay to repair; the tea cargo was sent on to England in another vessel, and the captain having repaired his ship, loaded a cargo of cottons at Bombay, and sent her therewith to Canton, on which voyage she was lost.

The Court held, that this policy, unlike the former, had never attached on the goods loaded at Bombay for the voyage to Canton; the insurance, they said, in this case, was on nothing but the goods laden on board at China for the homeward voyage thence to London.¹

The Court remarked that there was nothing on the face of this policy, nor in the circumstances of the case, to alter "the plain, fair, grammatical sense" of the words "beginning the risk on the goods from the loading thereof on board at China,"—there was no custom of trade authorizing the company to send back the ship from Bombay to Canton, so as to keep her still within the protection of a policy effected on a homeward voyage from Canton to London,—there was no intention of unloading the goods, for "it never was in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded, and employed in some other trade."

Limits of the
port for the
purposes of
this rule

The strict rule of construction which confines the policy to goods loaded at the terminus *a quo*, is not satisfied by their being loaded on board at a place that is within the legal limits merely of the port; unless it appear that the word used is understood in this extended sense by mercantile men.²

Constable v.
Noble.

Under a policy on goods, "at and from Lyme to London," it appeared that the goods were, in fact, loaded on board at

¹ Grant v. Paxton, 1 Taunt. 463.

² See the tests suggested by Lord Esher for ascertaining the limits of port in the commercial sense, in

Sailing Ship Garston Co. v. Hickie, 15 Q. B. Div. 580; and the cases collected in Maclachlan, Shipping, 377.

Bridport, a town nine miles from Lyme town, but a member of the port of Lyme; the Court held, in the absence of any mercantile usage to show that goods insured from Lyme might be loaded at Bridport, that the policy never attached on these goods.¹

In this case it appeared that there was no separate custom-house at Bridport Harbour; but *à fortiori* where goods insured "at and from Carmarthen to London," were, in fact, loaded on board at Llanelly, which, though, legally speaking, a member of the port of Carmarthen, yet has a separate custom-house at which vessels are cleared out, independent of that at Carmarthen, the Court held, that this policy had never attached on the goods loaded at Llanelly.²

Payne v.
Hutchinson.

On the contrary, if mercantile usage has extended the meaning proper to the words employed,—if under a policy on goods "at and from the ship's loading port or ports in Amelia Island," it appears that the ship never touched at Amelia Island at all, but took in her cargo at Tigre Island, which is a little higher up the river St. Mary's, and that this is usual for ships with such a destination,—there it is held that the policy attaches on the goods so loaded.³

By usage.

Moxon v.
Atkins.

A policy on goods "at and from" a foreign port covers only homeward cargo which is on board and from the time that it is on board. If there be a policy on outward cargo "until discharged and safely landed" at the same port, it will operate on so much of that cargo as remains on board, and so long as it remains on board, assuming that there is no improper delay in landing it, so that if there be homeward and outward cargo on board at the same time, the policies will operate concurrently and respectively.⁴

A policy on
goods "at
and from."

¹ Constable v. Noble, 2 Taunt. 403.

³ Moxon v. Atkins, 3 Camp. 200.

² Payne v. Hutchinson, 2 Taunt. 405, note. The law as to this point is the same in the United States; see Murray v. Columbian Ins. Co., 4 Johns. Rep. 443, cited 1 Phillips, Ins. no. 931.

⁴ See 2 Emerigon, c. xiii. s. 20,—*Perte peut elle en même tems arriver d'entrée et de sortie.* See 3 Boulay-Paty, Droit Mar. 421-428, and 3 Kent, Com. 309.

In case of
several ports
under one
designation.

If it be an island and not a port merely that is named, and there be two several policies, one on outward cargo, say "from London to Jamaica," and the other on homeward cargo "at and from Jamaica to London," and the ship, after discharging part of her outward and shipping part of her homeward cargo at one port in Jamaica, be lost while proceeding to another port in that island, in order to dispose of the residue of her outward and complete the loading of her homeward cargo, having part of both cargoes on board at the time of loss,—the outward policy continues to cover what remains on board of the outward cargo, and the homeward policy attaches on what has been taken on board of the homeward cargo.¹

Barter
policies.

In policies on the African barter traffic, after the usual clause giving extensive liberty to load, reload, exchange, sell, or barter, &c., there is usually a clause that outward cargo is to be considered homeward interest twenty-four hours after arrival at first port or place of trade, so that the new and the old cargo on board are protected during the barter transactions on the coast.²

Under such a policy on ship and goods for twelve months, a singular attempt was made to extend the barter clause so as to render the underwriter liable for loss, by fire, of cargo landed but not yet bartered, and of the produce received in exchange for part of it, although not yet shipped; it was held, however, that the risk ended with the safe landing of the goods.³

In the United
States, policy
on goods out-
ward, and on
their proceeds
home.

It has been decided in the United States that a policy on goods outward, and their proceeds home, will apply to a homeward cargo procured by money or credit of the consignees at the port of discharge, though the outward goods, for want of a market, have not in fact been sold so as to

¹ 2 Emerigon, c. xiii. s. 20, pp. 114, 115; 3 Boulay-Paty, Droit Mar. 422; Camden v. Cowley, 1 W. Bl. 417; Forbes v. Aspinall, 13 East, 323; Warre v. Miller, 4 B. & Cr. 538; Rickman v. Carstairs, 5 B. & Ad.

651; 3 Kent, Com. 309.

² Tobin v. Harford, 13 C. B., N. S. 791; 32 L. J. (C. P.) 134; (in error) 34 L. J. (C. P.) 37.

³ Harrison v. Ellis, 7 E. & B. 465; 26 L. J. (Q. B.) 239.

realize any proceeds.¹ Not so, however, if the goods on the return voyage be the same goods that were carried out but not landed at the outward port.²

A salvage company intending to raise the steamer *Alexandra*, ashore near Drogheda, effected a policy on "Four steam pumps, &c., valued at 2000*l.*, at and from Ardrossan by the salvage steamer *Sea Mew* to the *Alexandra*, ashore near Drogheda, and whilst there engaged at the wreck, and until again returned to Ardrossan;—the risk beginning from the loading on board the *Sea Mew* upon the said ship and (or) wreck, &c." The pumps safely arrived at the wreck, were used on board of it, and were successful in raising it. The wreck with the pumps still on board then started for Ardrossan in tow of several tugs, the *Sea Mew* also acting in that capacity; but the weather became so foul that they necessarily put about for Belfast, and before that port could be reached the wreck went down with the pumps on board. Although proof of usage to keep the pumps still on board the wreck until it had reached a port of safety was offered, and although the Court were disposed to think the pumps on board the wreck would have been covered by the policy whilst on the route to Ardrossan, they held that the words of the policy could not be enlarged to cover the passage to Belfast.³

The clause in the statutory form providing for the continuance and the end of the risk is somewhat disjointed; but in respect of goods, the words appear to run thus:—
 "and shall so continue and endure upon the goods and merchandises until the same be there discharged and safely landed."

Continuance
and end of
the risk on
goods.

By "safely landed" is meant safely delivered on shore, at

"Safely,
landed."

¹ *Haven v. Gray*, 12 Mass. Rep. 71; *Whitney v. The American Ins. Co.*, 3 Cowen, 210; 3 Kent, Com. 310.

² *Ibid.*

³ *Wingate v. Foster*, 3 Q. B. D. 582 (C. A.).

the ordinary wharfs and quays, or customary landing-places within the limits of the port of discharge.¹ These limits are to be ascertained, in case of doubt, by the evidence of mercantile usage.²

Policy covers lighters in landing, according to usage.

It is frequently necessary to employ smaller craft, such as lighters, shallops, &c., to carry the goods from the ship to the shore. Whenever it is established that such usage exists by the general course of trade, the underwriters are liable for loss or damage happening to the goods in the course of being so carried.

"The insurer," says Lord Mansfield, "in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. He took the risk upon the supposition that what was usual and necessary would be done, and therefore, when goods are insured 'till discharged and safely landed,' the insurance, without express words, extends to the boat, the usual manner of landing goods out of a ship upon the shore."³

In the port of London public lighters being employed in the general course of trade to unlade ships, goods while being so conveyed to the wharf are under the protection of the policy.⁴ So, where it appeared to be the usual course for ships in the contraband trade in the Spanish main to stand in as near to shore as they could, and then run the cargo in

¹ See as to this *Gatcliffe v. Bourne*, 4 Bing. N. C. 314; *Bourne v. Gatcliffe* (in error), 3 M. & Gr. 643; *S. C.*, before the House of Lords, 7 M. & Gr. 853.

² *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. Div. 580.

³ 1 Burr. 348. In France this general principle is confined to the taking of goods from the ship to the shore, and does not, as a general rule, extend to their transport from the ship, up rivers, to the port of dis-

charge; 2 Emerigon, c. xiii. s. 2, p. 49; 3 Boulay-Paty, *Droit Mar.* 419.

⁴ *Rucker v. London Ass. Co.*, 2 B. & P. 432, in notis; *Hurry v. Royal Exch. Ass. Co.*, *ibid.* 430. This protection was prevented by prior sale of the goods without providing for a transfer of the policy; *North of England Oilcake Co. v. Archangel Marit. Ins. Co.*, L. R., 10 Q. B. 249.

launches, it was held, that goods insured for this traffic were protected while in such launches.¹ So, where it appeared that the general usage was, with regard to all goods destined for a certain shallow bay in Jamaica, for ships to put in to the nearest practicable port and thence send the goods ashore in shallops, Lord Tenterden held, that the goods while being so sent on were protected by the policy.²

Goods for St. Petersburg, on board vessels of any burden, are unloaded at Cronstadt, about twenty miles from the capital, and thence sent on, up the Neva, in lighters. Before the cutting of the great canal of the Helder to Amsterdam, vessels of large burden sometimes unloaded at the Texel, and the largest class of vessels are still obliged to do so between Cuxhaven and Hamburg. In these cases, as the river navigation is a foreseen and customary part of the voyage, and the risk thereof calculated in the rate of premium, the goods would be protected in the river craft, under our common form of policies.³

In France, it seems that their policies, though not considered, as a general rule, to protect goods when sent on from the ship up a river to the port, will yet do so whenever there is a usage to unload goods at the sea-board, and thus send them on, as from Paimbœuf to Nantes, though the distance between the two places is ten French leagues.⁴ In France.

So, in the United States, on its being proved that hides were generally sent ashore at New York from the ship in boats, the Supreme Court of the United States held, that the risk was covered while they were being so sent;⁵ and in one case there decided, the principle was carried to the extent of protecting goods destined for a Mexican port while being carried up from the river-bar to the town partly in boats, and partly overland on mules, that being shown to be the In the United States.

¹ *Matthie v. Potts*, 3 B. & P. 23.

² *Stewart v. Bell*, 5 B. & Ald. 238.

³ See 2 Benecke, des Assurances, 213.

⁴ 2 Emerigon, 49; 3 Boulay-Paty,

Droit Mar. 419, 420; 1 Nolte's Benecke, 654.

⁵ *Wadsworth v. Pacific Ins. Co.*, 4 Wendall's Rep. 38.

general mode of conveying them to their place of destination.¹

Unless it be the assured's own lighter or in his own care.

But in all such cases the assured may terminate the risk before the time when it would expire in the usual course under the policy, by receiving the goods out of the ship into his own care. Thus, although goods, while being carried in lighters from ship to shore, are, generally speaking, protected in the port of London, yet a merchant there was held to have put an end to this protection by himself sending for them and bringing them ashore in his own lighter.²

The same principle holds where the merchant takes the goods into his own care and possession before they are landed. Thus, where goods were brought in a public lighter to the merchant's wharf, but, owing to the roughness of the weather, could not then be unloaded; and thereupon the merchant dismissed the lighterman, and told him to leave his lighter all night moored to the wharf, where he himself would look after it, and in the course of the night the lighter with the goods on board sunk; the Court held that the merchant, by thus taking the goods into his own care and possession, had discharged the underwriter from liability.³

Risk of craft till landed.

Where the policy expressly provided for "all risk of craft until the goods are discharged and safely landed," and the goods were put into lighters at the port of destination named in the policy, not, however, for the purpose of being landed,

¹ *Oscar v. Louisiana Ins. Co.*, 5 Martin, N. S. 386, cited 1 Phillips, Ins. no. 970.

² *Sparrow v. Carruthers*, 2 Str. 1236. Mr. Marshall (Ins. vol. i. 252) remarks on this decision, that if there were a custom for merchants in any port to use their own lighters in landing goods, they would be protected by the policy; and there is no doubt they would. See also 2 Benecke, des Assurances, 213.

The words of Heath, J., in respect

of *Sparrow v. Carruthers*, should never be cited from *Hurry v. Royal Exch. Ass. Co.*, 2 B. & P. 435, without reference to *Strong v. Nattaly*, 1 B. & P. N. R. 16, 19, which was decided upon the authority of that case, and in which some misconception respecting *Sparrow v. Carruthers* is adverted to and cleared away.

³ *Strong v. Nattaly*, 1 B. & P. N. R. 16.

but of being transhipped into export vessels bound for a foreign port, the loss caused by the swamping of some of the lighters, while waiting under these circumstances to tranship their cargoes, was held not to be a loss within the risk described in the policy.¹ The goods were not landed, nor were they in lighters for the purpose of being landed, but for the purpose of being transhipped, a purpose that could not be expressed by the term "landed."

Whenever the goods can be considered as landed according to the usual course of business at the port of destination, the risk ends, though they may never have been delivered into the hands of the consignees.²

Thus, at Revel, the port of discharge, the cargo was (according to the uniform course of business in that port) unloaded into government lighters by the revenue officers and lodged in government warehouses, where it was afterwards confiscated, without ever coming into the hands of the consignees, and Lord Ellenborough held that the risk had ceased on its being landed.³

The general rule, in fact, is clear, that the underwriter in a sea policy insures only against sea risks; the risk on goods, therefore, ends directly they are put on *terra firma*, unless they are placed there only for a temporary purpose subsidiary to the main purpose of the voyage, or under such circumstances as to be protected by the usage of the trade.⁴

The following American case, which seems to have been well decided, affords a good illustration of this rule. An insurance had been effected on "specie and merchandise out, and merchandise home, at and from Boston to ports in the islands of Sumatra and Java, for the purpose of disposing of the outward and procuring a return cargo, &c.,

¹ *Houlder v. Merchants Mar. Ins. Co.*, 17 Q. B. D. 354.

² *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *S. C.*, before the House of Lords, 7 M. & Gr. 850.

³ *Brown v. Carstairs*, 3 Camp. 161.

⁴ *Harrison v. Ellis*, 7 E. & B. 465; 26 L. J. (Q. B.) 239; contrasted with *Pelly v. Royal Exch. Ass. Co.*, 1 Burr. 341; *Brough v. Whitmore*, 4 T. R. 206.

with liberty to touch at the usual places and trade thereat." The captain had landed, at a port in Sumatra, a chest of opium, part of the outward cargo, to be exchanged for a certain quantity of pepper and dollars, but not being able to come to terms, had taken up the chest and stowed it in the launch for the purpose of being carried back to the ship, when the natives made a rush on the crew, overpowered them, and carried off the opium; the Court in the United States held, that, under these circumstances, the opium was protected by the policy. Sedgwick, J., in giving the judgment of the Court, said,—“The insurers insured the plaintiff against the restraint and detention of princes for the purpose of disposing of the outward, and procuring a return cargo, and, while executing this purpose, the property was violently seized. The goods were as much protected by the policy, in the boats, while employed as auxiliary to the voyage, as they were on board the ship.”¹

Damage in
unloading.

As by our law, the risk on the goods continues until they are safely landed at the wharfs or usual landing places of the port of discharge, any damage caused to the goods in the course of unloading them from the ship into the lighters, or from the lighters to the wharf, would fall on the underwriters, always supposing, that is, that such damage be not imputable to the fault of the assured. Accordingly, where a policy, otherwise in the common form, gave a special power of shipping and reshipping the goods, Lee, C. J., held that the policy would extend to cover a loss happening in the unloading and reshipping from one ship to another.²

In a more recent case, though the words were “risk of transshipment, or landing and reshipment,” such as would cover a loss by fire during a continuous process of transshipment, or while being landed, or being reshipped, it was held that in the absence of custom they would not cover a loss by

¹ *Parsons v. Massachusetts Fire & Mar. Ins. Co.*, 6 Mass. Rep. 197; 1 Phillips, Ins. no. 970.

² *Tierney v. Etherington*, cited 1 Burr. 348.

fire while the goods, after being landed, were stored in a warehouse and were waiting to be shipped.¹

The law of France, following the Guidon² and the laws of Oleron,³ throws the responsibility for damage in unloading on the master alone.⁴ But by the greater number of the other Continental codes, it is made, as in our law, to rest, at all events primarily, on the underwriter.⁵

In our common policies no fixed period of time is specified during which the risk on the goods is limited to continue after the ship's arrival; in other words, there is no specified time within which their landing must be completed, and beyond which they will be out of the protection of the policy. The only rule in this country in such a case is, that they must be landed within a reasonable time from the ship's arrival.

Time within which goods are to be landed.

The law of France in this respect agrees with our own.⁶ But by several foreign ordinances, it is provided that the risk upon the goods shall continue only for a certain limited number of days after the ship's arrival at the port of discharge, unless the unloading be delayed for a longer period by lawful and unavoidable hindrances; and even in such case, only for a longer fixed period.⁷

The reasons given for preferring a fixed number of days are—1st, to avoid all litigation as to what shall be deemed

¹ Australian Agricultural Co. v. Saunders, L. R., 10 C. P. 668.

² Guidon, chap. v. art. 7.

³ Jugemens d'Oleron, art. 10.

⁴ See 2 Emerigon, c. 12, s. 48, pp. 25, 26.

⁵ See the Hamburg Ordinance, tit. vii. art. 4. If the defect be in the ship's tackle, he has his remedy over against the shipowner; the Prussian Landgerecht, art. 2188, and others, 2 Benecke, des Assecuranz, 213; 1 Nolte's ed. 664, 665.

⁶ The Code de Commerce, art. 328, 341, provides that the risk on goods shall continue "jusqu'au jour où elles sont délivrées à terre."

The Law of the German Empire seems to be identical in this respect with our own (art. 828).

⁷ By the Insurance Ordinance of Amsterdam (art. 5), the risk is to continue fifteen days after the ship's arrival: by that of Rotterdam (art. 46-49) for fourteen working days: by the Insurance Code of Sweden (art. 5, s. 19) and of Prussia (tit. Insurance, art. 2184, 2185, 2189, 2190), and by a clause in the Danish policies, the ordinary duration of the risk is fixed at fifteen days, in cases of justifiable delay at twenty-one days. See Magens, vol. ii., and 2 Benecke, des Assecuranz, 209.

a reasonable time; 2ndly, to compel a speedy clearance of the cargo. Mr. Benecke, however, after examining the different provisions of foreign states on this subject, concludes that the rule adopted in England and France is, upon the whole, preferable; and this opinion seems well founded.¹

Under the nature and usages of the trade.

It is, of course, competent for the parties, and with some of the Scotch insurance companies it appears to be customary, to specify a fixed period in the policy for this purpose. But as to the extent of a reasonable time after the ship's arrival at the port of discharge, within the meaning of the rule in this country, this depends entirely on the nature and usages of trade, the main object of the adventure, and the possible opportunity of discharge at the quay, or in the berth, or dock usual for unloading at the port of discharge.

In the barter trade.

Thus, under a policy for the African barter trade in gum, the risk to continue on ship "till moored at anchor for twenty-four hours in good safety," and on cargo "till discharged and safely landed," the ship was captured about a month after arrival on the African coast, at which time, as no gums had been brought down to the coast by the natives, no part of her outward cargo had been landed for the purposes of barter; and Lord Kenyon held that, as, under the circumstances, no unnecessary delay appeared to have taken place, the risk on the outward cargo was a continuing risk at the time of the loss.²

In the Newfoundland fishing trade.

In the Newfoundland and Labrador trade the great object of the adventure being to catch fish, the outward cargo very generally consists in great part of salt for curing the fish caught, and provisions for victualling the crew. This part of the cargo is naturally consumed as it is wanted, and never landed at all; even such part of it as may consist of merchandise is frequently not landed until the fishing, which is the main business of the adventure, leaves the

¹ 2 Benecke, des Assecuranz, 223; Nolte agrees with him, vol. i. pp. 657-660.

² Parkinson v. Collier, 2 Park, Ins.

653; 1 Marshall, Ins. 255. It is obvious that in such a case as this a fixed rule of time would have operated unjustly.

crew at liberty to discharge it. In the case, therefore, of outward cargoes insured on board ships engaged in this trade by policies in the common form, continuing the risk on the goods "till discharged or safely landed," it has been held that such outward cargoes were protected by the policy, though in one instance, they were still on board for thirty, and in another for fifty, days after the ship's arrival off the coast.¹

When goods are insured in the common form, the risk upon them continues until they are safely landed at the particular port which is either named in the policy as their ultimate port of discharge, or contemplated as such by the parties; and this, though the ship may touch at an intermediate port and remain there for twenty-four hours, and even unload part of the cargo there, and taken in substituted goods in its place.²

Application
of the general
rule.

Even when the place named in the policy as the *terminus ad quem* of the voyage is one of the West India Islands, or other place containing several ports, an outward policy on the goods will, generally speaking, enure to protect them until the whole of the outward cargo, or, at all events, until the great bulk of it, has been safely landed at that port in the island which was, in fact, contemplated by the parties as the ultimate port of discharge.³

Where, indeed, the great bulk of the outward cargo, under such a policy, has been unloaded and sold at any given port, either in that island, or elsewhere within the limits of the voyage, and that which remains on board, being trifling in quantity, is taken on, either as ballast, or because it could not be sold at the port where the rest was disposed of, in such cases the risk on the outward cargo will be held to have terminated at the port where the bulk of it was sold; and the liability of the underwriters on the outward policy will

Most of the
cargo being
discharged.

¹ *Noble v. Kennoway*, 2 Dougl. 510; *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, *ibid.* 505.

London Ass. Co., 1 Marshall, Ins. 266; *Leigh v. Mather*, 1 Esp. 412.

² Lord Mansfield in *Barrass v.*

³ *Barrass v. London Ass. Co.*, 1 Marshall, Ins. 266.

not be held to continue merely because, at the time of loss, an insignificant portion of the outward cargo may still be on board.

This principle, which is equitable and well adapted to the real intentions of the parties, has long been established in the law of France;¹ and has received abundant confirmation in the jurisprudence of this country.²

Leigh v.
Mather.

Thus, where an insurance was made on ship and goods "at and from Georgia to Jamaica," and the ship arrived at Montego Bay, which was the port to which the cargo was originally destined, where she remained a month, and during that period sold and delivered the greatest part of her cargo to merchants there, and would have disposed of the whole but for a verbal agreement with a party who chartered the vessel for a voyage from Montego Bay to St. Anne's, for a cargo, and thence to London, by which agreement part of the outward cargo, which was lumber, was to be carried in ballast to St. Anne's; Lord Kenyon held that, under these circumstances, the risk on the outward cargo came to an end when the bulk of it was landed at Montego Bay, and did not continue on that part of it which was carried on as ballast to St. Anne's.³

The subject will receive further illustration when we come to consider the duration of risk on the ship.

When trans-
shipped of
necessity.

When the risk on goods is declared by the policy to continue, as in the common form, "during the ship's voyage to the port of discharge, until the goods be there discharged and safely landed," the policy protects them until the whole or the bulk of them are landed at the port where, in fact, the ship begins to discharge them.⁴ If, in the course of the

¹ Emerigon, c. xiii. s. 20; 3 Boulay-Paty, Droit Mar. 421-429.

² Barrass v. London Ass. Co., 1 Marshall, Ins. 266; Leigh v. Mather, ibid. As to the ship, Inglis v. Vaux, 3 Camp. 437; Moore v. Taylor, 1 A. & E. 25.

³ Leigh v. Mather, as reported 1 Marshall, Ins. 266. The case, as reported in 1 Esp. 412, is not consistent with the principles above laid down, nor, it is submitted, with law.

⁴ Clason v. Simonds, 6 T. R. 533, note; Moore v. Taylor, 1 A. & E. 25.

voyage, the original ship becomes disabled before arriving at such port, and the goods are, by the master, necessarily transhipped and sent on in another vessel, the risk on the goods continues until they are safely landed out of the substituted ship at the port of original destination;¹ but this is only so where a case of clear necessity is made out.²

In the following case a question was made as to the continuance of the risk on goods insured "until arrived at the last place of discharge in the outward voyage." The goods in question were the investment of an East India captain, and the voyage for which they were insured was described in the policy to be "at and from London to Madeira, the Cape of Good Hope, and all or any of the ports or places in the East Indies, China, Persia, or elsewhere, on this or the other side of the Cape," "until arrived at the last place of discharge on the outward voyage, with leave to exchange the goods in the course of the voyage." The ship arrived at Calcutta, and there discharged the whole of the cargo she carried out for the East India Company; after which she was ordered by the Company on an intermediate voyage to Madras, and took on board a cargo to be conveyed thither. The captain had also landed the whole of his investment (the goods insured by this policy) at Calcutta, and had disposed of a considerable part of it; but, being unable to find purchasers for the residue, he resolved to carry it on to a new market, and, with this view, reloaded it on board the ship for Madras. The ship was lost on the intermediate voyage from Calcutta to Madras. Lord Ellenborough held, that the risk ended at Calcutta; for, as all the company's outward cargo had been discharged there, that port was the "last place of discharge on the outward voyage," upon the true construction of the policy.³

When reloaded for want of a market.

¹ *Plantamour v. Staples*, 1 Marsh., Swann, 16 C. B., N. S. 772. Ins. 164.

³ *Richardson v. London Ass. Co.*,

² *Bold v. Rotheram*, 8 Q. B. 797; ⁴ *Camp*. 94.
15 L. J. (Q. B.) 279; *De Cuadra v.*

Insurance "to
a market."

Lord Ellenborough, in the course of his judgment in the preceding case, said: "If the Company's officers wish for the protection which is here sought (*i.e.*, until the goods are finally disposed of in some market in the East Indies), they must not limit the risk to the duration of the outward voyage, but extend it to the arrival of the goods to a market at their final port of discharge." No doubt, an insurance in such a form would effectually protect the goods until the whole were actually disposed of in some foreign market.¹

Final port of
destination.

Oliverson v.
Brightman.

It will frequently become a question of fact depending upon the intention of the parties, what "the final port of destination" really was. During the suspension of friendly relations between this country and China, in 1841, *The Penang* arrived in Macao Roads, under a policy on cargo from Liverpool for various ports in China, with most extensive liberty in the China seas to tranship cargo on board any other vessel, to visit any ports, and to remain there till it should be deemed expedient to proceed to her port or ports of discharge, continuing the risk "until the goods should be arrived at their final port of destination."

The consignees at Macao, finding that it would be dangerous to send the goods up the river to Canton, and also that it would be necessary, owing to sea-damage sustained in the voyage, to tranship them, hired *The James Laing* as a temporary receiving ship, and sent her with *The Penang* to Hong Kong, the safest anchorage in those seas, in order there to receive the cargo from *The Penang*, for the purpose, 1st, of examining it; 2nd, of keeping it on board in a place of safety till it could be sent on to Canton, or some other market in China, where it could be sold; there being then no market whatever at Hong Kong. In the course of transhipment in Hong Kong Roads, *The James Laing*, and

¹ See post, p. 421, the cases as to the continuance of risk on ship.

all the goods that had, up to that time, been transhipped into her, were sunk by a violent typhoon, and utterly lost.

In an action for this loss, the Court, upon these facts, were clearly of opinion that Hong Kong was not the final port of destination within the contemplation of the parties; and, further, that the principle of *Brown v. Vigne*,—that if a vessel, instead of proceeding to her originally destined port, chooses to wait at another, until the termination of war, the voyage is thereby determined,—was inapplicable to the circumstances in this case; for, in those of *Brown v. Vigne*, there was the existence of actual war with Spain, which rendered it illegal to send on the goods to their original port of destination; whereas here, there having been no actual declaration of war against China, it would not have been illegal, but only dangerous and inexpedient, to have sent the goods on to Canton, or any other market in China. Accordingly, the risk on these goods was held a continuing risk at the time of the loss, and the plaintiff, therefore, entitled to recover.¹

The facts of this case are very similar to those of *Tierney v. Etherington*. In that case goods were insured on board a Dutch ship “from Malaga to Gibraltar, and at and from thence to England and Holland, both or either,” continuing the risk “till the ship and goods be arrived at England or Holland, and there safely landed.” There was a special clause in the policy, by which it was agreed that, on the arrival of the ship at Gibraltar, the goods might be unloaded and re-shipped in one or more British ship or ships for England and Holland, &c. When the ship arrived at Gibraltar there was no British ship there, and the goods were unloaded and put into a store-ship (which it was proved was always considered as a warehouse), in order to be kept there

*Tierney v.
Etherington.*

¹ *Oliverson v. Brightman*, 8 Q. B. 781; 15 L. J. (Q. B.) 274. In this case the policy contained an express liberty “to tranship.” In another case on the same adventure, where

the policy contained no such liberty, the Court, on proof of the above facts, directed a non-suit; *Bold v. Rotherham*, *ibid.*

till some British ship should arrive. Two days after the goods were put into this store-ship they were lost in a storm.

For the underwriter it was objected that the risk on the goods was at an end upon their being loaded into this store-ship, which was to be considered as a warehouse on land; but Lee, C. J., held that the construction should be according to the course of trade in Gibraltar; and that, as it appeared to be the usual method of unloading and re-shipping in that place, that when there is no British ship there the goods should be kept in store-ships until one arrives, the risk upon the goods so loaded, according to such custom, should be held to continue, and the underwriters to be liable.¹

Predetermination of the risk.

The risk may be terminated at any intermediate stage of the voyage, but not so as to give a right to return of premium, except either by subsequent arrangement of the parties, or in accordance with prior stipulation in the policy. There was a policy on wheat to several ports named "to return 20s. premium if the risk end at Emden, or in the United Kingdom direct." The wheat was sold, "including insurance to Emden," and was totally lost at sea between Emden and the United Kingdom. The vendee sued in the name of the vendor, but failed to recover owing to the conditions of his own purchase,² and the predetermination of the risk by the vendor.

Prolongation of the risk.

By express contract the protection of the policy may be prolonged after landing, and during the subsequent transport of the goods overland. Thus, in a policy, the voyage was described,—“At and from Japan and (or) Shanghai to Marseilles and (or) Leghorn, and (or) London via Marseilles and (or) Southampton, and whilst remaining there for transit, with leave to call, &c., in the good ship or vessel called *The* steamers or steamer, per overland,

¹ Tierney v. Etherington, cited 1 Burr. 348, 349. The custom here alleged and found distinguishes the case from that of the Australian Agricultural Company v. Saunders, L. R., 10 C. P. 668, where no such

custom existed. See ante, p. 395.

² Ionides v. Harford, 29 L. J. (Ex.) 36. See North of England Oil Cake Co. v. Archangel Marit. Insur. Co., L. R., 10 Q. B. 249.

or *viâ Suez Canal*," &c. In the margin was this memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and (or) the steamers of the Mercantile Trading Company of Liverpool only."

The goods were shipped and paid for to London by the Messageries Impériales steamers, whose customary route, followed in this instance, was from Shanghai to Marseilles, and thence overland, through France, *viâ Paris*, where they arrived on the 13th September, 1870; and while they were still there, the German armies approached on the 19th September, and surrounded the city, preventing the goods after that event from being forwarded to London. It was held that the goods being still covered by the policy, there was a total loss within the meaning of the peril described therein, as "the arrests, restraints, and detainments of kings, princes, and people."¹

We come now to consider the duration of the risk on ship, and, first, as to the commencement of it.

Duration of
risk on the
ship.

In most of the Continental states the commencement of the risk on the ship is fixed by their Ordinances, subject, of course, to be varied by the express stipulations of the parties. In many of the mercantile states of the Continent, it is made to commence from the moment of the ship beginning to load the goods on board, or even to take in ballast, for the purposes of the voyage insured.² In France, unless otherwise stipulated by the policy, the risk on ship commences from the day on which the ship sails from the port of loading.³

Commence-
ment of risk.

Foreign Law.

In this country, the period at which the risk on the ship

English Law.

¹ *Rodocanachi v. Elliott*, L. R., 8 C. P. 649.

³ *Code de Commerce*, art. 328, 341. The Russian law is to the same effect,

² 2 *Benecke, des Assecuranz*, 229; 2 *Benecke*, 230.

¹ *Nolte's ed.* 668-671.

commences depends entirely on the terms of the policy, and the nature of the voyage intended to be insured.

Insured
"from" a
port.

If the ship be insured simply "from" a port, or if the adventure on the ship be made by the policy "to begin on the ship from A. B.," the risk on the ship does not commence until the ship sails on her voyage "from" such port, *i. e.*, until she quits her moorings and breaks ground, being in a state of perfect equipment and readiness for the voyage.¹

Insured "at
and from" a
home port.

If the ship be insured "at and from" a home port as the *terminus a quo* in which the ship is then lying, the risk commences on the ship immediately upon the execution of the policy, and continues during the whole time the ship remains in the home port in a course of preparation for her voyage.²

"At and
from" a
foreign port.

The words "at and from" a foreign port do not imply a warranty or a representation that the ship is at the time of effecting the policy in the port in question;³ but they do imply that the ship will be there within such a time afterwards that the risk shall not be materially varied; and that any unreasonable delay between the making of the policy and the commencement of the risk, *whether such delay be voluntary or involuntary*, which has the effect of materially varying the risk, will prevent the policy from attaching.⁴

Conditions
of the policy
attaching.

The facts of the case on which this latter decision was founded were these. The policy, "at and from Montreal," was effected on the 13th of July. No question was put by the underwriter as to where the ship then was, and no information was offered by the assured; but in fact she was then at sea, on a voyage intended to end at Montreal. She

¹ 1 Marshall, Ins. 260; Pittegrew v. Pringle, 3 B. & Ad. 514; so in the United States, see 3 Kent, Com. 307, note.

² Motteux v. London Ass. Co., 1

Atkyns, 548; Palmer v. Marshall, 8 Bing. 79.

³ Hull v. Cooper, 14 East, 479.

⁴ De Wolf v. Archangel Marit. Bank & Ins. Co., L. R., 9 Q. B. 451.

did not arrive at Montreal till the 30th of August. Evidence was given on the trial that the delay of arrival at Montreal had materially varied the risk and the rate of premium. Evidence was offered, but not received, to show that the delay was not voluntary, but was due entirely to sea perils upon the voyage to Montreal. It was held, that this evidence was properly rejected, as upon the facts of this case, the only question for the jury was, whether the delay had materially varied the risk.¹

The above decision is the earliest in our books, as to the effect of involuntary delay preceding the time fixed for such a policy attaching. The question had come before Tindal, C. J., in respect of voluntary delay, and was then decided adversely to the assured.² That learned judge, in the course of his observations, seems to intimate that his decision would have been the other way in case the underwriter had been prepared to expect delay by notice, or what is equivalent to notice, by the existence of a usage.³ But Blackburn, J., in the later decision already cited, expressly reserves his opinion as to the effect of either notice or usage on the question.⁴

A further condition of the policy attaching in such a case, is that the ship must have once been at the outward port in good physical safety.

Hence under a policy on ship "at and from St. Michael's, or all or any of the Western Islands, to England," where it appeared that the ship, after encountering very bad weather on the whole of the outward voyage, cast anchor off St. Michael's in such a leaky condition as to be unfit to take in a cargo, and was only kept afloat by pumping, and that, after lying in the roadstead for upwards of twenty-four hours (during the whole of which time she was in great danger from the storm that still continued), she was blown out to sea, and wrecked. Lord Ellenborough held, that, under these

¹ Ibid.

² Mount v. Larkins, 8 Bing. 108.

³ Ibid. 121.

⁴ De Wolf v. Archangel Marit. Bank & Ins. Co., supra.

Parmeter v. Cousins.

circumstances, the risk had never commenced on the ship under the homeward policy, for the ship had never been at St. Michael's in good safety.¹

To be there
in physical,
not political,
safety.

But all that is required in such case is, that the ship should have been once "at" the *terminus in quo* of the homeward voyage in good physical safety, irrespective altogether of political danger.

Bell v. Bell.

Thus, under a policy on ship "at and from Riga to her ports of discharge in the United Kingdom," where immediately on arrival at Riga her papers were seized by government, and the ship and cargo sequestered and condemned before the outward cargo had been discharged, Lord Ellenborough held; that, as the ship had been once "at" Riga in good physical safety, the risk under the homeward policy had attached on the ship.²

What physical
safety is
required.

All that is required, in fact, is, that the ship while in the foreign port, which, by the policy, is made the *terminus a quo* of the homeward voyage, should "be in such a condition as to enable her to lie there in reasonable security, till she is properly repaired and equipped for her voyage;"³ if she be able to keep afloat in harbour sufficiently for the purpose of being repaired,⁴ the risk under such a policy commences immediately on her first arrival, and continues during the time she remains there in a course of preparation for the voyage insured.⁵

Under a policy on ship "at and from" Havana to Greenock, the ship arrived off Havana, and the master engaged a tug

¹ *Parmeter v. Cousins*, 2 Camp. 148.
235.

² *Bell v. Bell*, 2 Camp. 475.

³ Per Lord Ellenborough, *Parmeter v. Cousins*, 2 Camp. 235, 237; *Haughton v. Empire Mar. Ins. Co.*, L. R., 1 Ex. 206.

⁴ *Annen v. Woodman*, 3 Taunt. 299. See also per Lord Kenyon, in *Forbes v. Wilson*, 1 Marshall, Ins.

⁵ Thus Lord Hardwicke laid it down that when a ship is thus insured "at and from" an outport for the homeward voyage, the words "first arrival" are always implied: *Motteux v. London Ass. Co.*, 1 Atk. 548; *Forbes v. Wilson*, 1 Marshall, Ins. 148; *Smith v. Surridge*, 4 Esq. 25.

and pilot for the purpose of taking her to a clear anchorage. She was towed into the harbour, past the place where she ultimately discharged her cargo, to a point at the head of the harbour called the Regla Shoal. There she grounded, and received damage from the anchor of another ship. "In my opinion," says Channell, B., delivering judgment in the case, "she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred at Havana, geographically speaking, and there is nothing which to my mind shows that the parties, at the time this policy was underwritten, contemplated any other meaning of the word *at*. All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety."¹

Length of time consumed in necessary repairs, though considerable, does not take the ship out of the protection of the policy, if the repairs be with an ultimate view to the voyage insured;² nor does any other reasonable delay, if justified by necessity, or incurred *bonâ fide* for the purposes of the voyage³—it may be to take in simulated papers,⁴ or a particular description of crew,⁵ or provisions when rendered necessary by unavoidable delay.⁶

What delay
is excusable.

The principle, in short, established by the cases is, "that a detention for a reasonable time for the purposes of the adventure insured must be allowed, and whether the time is reasonable must be determined, not by any positive or arbitrary rule, but by the state of things existing in the port where the vessel happens to be."⁷

¹ *Houghton v. Empire Marine Ins. Co.*, L. R., 1 Exch. 206, 209, 210.

² *Motteux v. London Ass. Co.*, 1 Atk. 548.

³ *Smith v. Surridge*, 4 Esq. 25; *Grant v. King*, 4 Esq. 174.

⁴ *Langhorn v. Allnutt*, 4 Taunt. 511.

⁵ *Grant v. King*, 4 Esq. 174.

⁶ *Raine v. Bell*, 9 East, 195.

⁷ Per Tindal, C. J., in *Phillips v. Irving*, 7 M. & Gr. 328. See to the

What delay
inexcusable.

On the other hand, it must be borne in mind that a policy on ship "at and from" a port implies, in respect of a ship already in the port, that the voyage insured shall be very shortly commenced, or, at all events, be in the near contemplation of the parties.¹ Otherwise all protection under the policy is lost, if an unreasonable time elapse before preparing for the voyage insured, and there be no excuse for delay, such as the necessity for repairs.

Thus, for instance, if all thought of the voyage insured be laid aside, and the ship lie in the port for years, with the knowledge of the owner, the risk would be held, either never to have attached, or, at all events, to have come to an end directly the determination to abandon the voyage was finally fixed.²

In foreign
port.

In case it be a foreign port, and she have been lying there a long period without reference to any particular voyage, it seems the policy will attach only from the time that preparations are commenced with reference to the voyage insured.³

In home port.

In case it be a home port, and she is then lying there, the policy generally attaches from the period of its subscription, but the ship is not protected by it if any unreasonable delay intervene between the subscription of the policy and her sailing on the voyage insured. Thus a policy was effected on the 28th January, "at and from Bristol to London," on a yacht then lying in the port of Bristol, and it did not sail thence till the middle of May following, the delay not being

same effect the remarks of Story, J., in *Seamans v. Loring*, 1 Mason's R. 127, cited in 1 Phillips, no. 935.

¹ Per Tindal, C. J., in *Palmer v. Marshall*, 8 Bing. 317, 318. "It is clear insurance law," says Park, J., "that in a policy 'at and from' a port, a vessel ought to be ready to sail as soon as she reasonably can, and not to

lie in the port for months before she takes her departure:" *Palmer v. Fenning*, 9 Bing. 462.

² See the observations of Lord Hardwicke in *Chitty v. Selwyn*, 2 Atk. 539.

³ Per Story, J., *Seamans v. Loring*, 1 Mason's R. 127, cited in 1 Phillips, Ins. no. 935.

for repairs or other necessary purpose; there the Court held this delay unreasonable, and that the yacht at the time of the loss was not protected by the policy.¹

This general rule is liable, however, to be modified by the usages of a particular trade. Thus, in the Newfoundland trade, owing to the well-known practice of making fishing expeditions or intermediate trading voyages after the ship's first arrival off the coast of Newfoundland, the homeward risk, though expressed to be "at and from" any port or ports in Newfoundland, does not attach on the ship on her first arrival out, but only from her beginning to prepare for the homeward voyage.²

Exception by usage.

What is such a beginning to prepare for her homeward voyage, within the meaning of the rule, as brings the vessel under protection of the policy, appears by the following case:—A ship engaged in a cruising voyage in the Southern Atlantic, was insured for a trading voyage home by a policy "at and from Pernambuco or any other port or ports in the Brazils to London,—beginning the adventure on the goods from the loading thereof on board, and upon the ship on the determination of her cruise, and preparing for her voyage to London," &c. The cruise being ended, the captain went to Pernambuco, and when off that place, sent in one of his officers to see if a homeward cargo could be procured there, but as there was none, he sailed southwards for St. Salvador for the same purpose, and was lost at sea between the two places. The Court held, that this going to Pernambuco, and sending in an officer to inquire after a cargo, was such "a preparing for his voyage to London" within the words of the policy, that the homeward risk attached from that moment, and continued at the time of the loss.³

"Beginning to prepare for her homeward voyage."

Lambert v. Liddard.

¹ *Palmer v. Marshall*, 8 Bing. 79, 317. *S. C.*, *Palmer v. Fenning*, 9 Bing. 460.

² *Vallance v. Dewar*, 1 Camp. 503,

and the other cases there collected.

³ *Lambert v. Liddard*, 1 Marshall's R. 149; *S. C.*, 5 Taunt. 479.

What is
included in
"port."

We have already seen that the terminus "at and from" which the voyage is made to commence, is, generally speaking, taken to include, not different places classed together in legal style, or for the purposes of revenue, as one port, but some one place, which in the more limited and commercial sense is considered the port; in other words, the harbour-town.¹ If the policy be "at and from a port or ports" or "port or places" in the alternative, it must be supposed that the insurer underwrote the greater risk of letting the ship sail to several places in order to take in her cargo.² But where a ship was insured "at and from her port of lading," the Court held, that the expression "port of lading," pointed to one single place, and did not allow of the ship loading at two distinct places (though both lying within seven miles of one another in the same bay), in either of which there might have been a lading.³

Not neces-
sarily imply
an artificial
harbour.

It is not at all necessary to the definition of the term "port," as used in policies, that it should be an artificial harbour shut in with regular moles or piers. If it be a natural basin protected by a headland, or even an open roadstead, provided it be the usual and sole place of loading and unloading, it is sufficient, especially if there be the usual machinery and appendages of a harbour. Thus, in one case, the Court of King's Bench held that the expression "to any port or ports whatsoever," in a time policy, ought to be construed as if it were "place or places," and would protect the ship while anchored in an open roadstead, if that were the usual place for loading and unloading goods.⁴

¹ *Constable v. Noble*, 2 Taunt. 403; *Payne v. Hutchinson*, *ibid.* 405, note; *Brown v. Tayleur*, 4 A. & E. 241. See, also, as to the meaning of the word "port," *Hull Dock Company v. Browne*, 2 B. & Ad. 43; *Stockton and Darlington Rail. Co. v. Barrett*, 7 M. & Gr. 870, in Dom. Proc.; *Roelandts v. Harrison*, 9 Exch. 444; *Van Baggen v. Baines*, 9 Exch. 523;

Sailing Ship Garston Co. v. Hickie, 15 Q. B. D. 580.

² *Lambert v. Liddard*, 1 Marshall, R. 149; and see the discussion in *Brown v. Tayleur*, 4 A. & E. 241.

³ *Brown v. Tayleur*, 4 A. & E. 241.

⁴ *Cockey v. Atkinson*, 2 B. & Ald. 460; *S. P.* in the United States, *De-longuemere v. Firemen's Ins. Co.*,

A ship insured "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence and two other ports in Spain, to a port in Great Britain," was lost while loading at Saloe. The roadstead there was the usual station for vessels of her burden. Saloe town lay at the bottom of a natural basin, protected by a headland, and without any artificial harbour. It was frequented as a port, was usually designated as such, and so was recognized by the Spanish government and also by this country, which had a vice-consul there; it had a custom-house and harbour-master; port dues were levied there, and at the time of the loss, conveniences were erected on the shore for the purpose of loading goods and of protecting smaller vessels from wind and weather. On this evidence the House of Lords, affirming the judgment of the Scotch Court of Session, decided that it was a port within the meaning of the policy.¹

Sea Ins. Co.
v. Gavin.

When the policy is "at and from" an island or other district containing several ports, the risk on ship under the homeward policy commences directly the ship has been moored in good safety at the first port at which she touches in the island, for the purpose of discharging her outward cargo. Hence, where a ship insured for her outward voyage from London to Jamaica "until moored twenty-four hours in good safety," was insured by a homeward policy "at and from Jamaica to London," and was lost in coasting the island, after she had stayed some days at one port there, but before she had delivered all her outward cargo, a special jury found, and Lord Mansfield supported their finding, that this loss on the ship was at the risk of the underwriters on the homeward policy.²

"At and from" an island containing several ports.

10 Johnson's Rep. 120, cited in 1 Phillips, Ins. no. 929. See per curiam, *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. Div. 580.

¹ *Sea Insurance Co. v. Gavin*, 2 Dow & Clark, 124. Several additional cases as to the meaning of the

word port will be found in the section on "Warranties to be free of Seizure and Confiscation in Port," Part III. Chap. III. *Excepted Risks*.

² *Camden v. Cowley*, 1 W. Bl. 417, 418.

Ever since this case it has been clear insurance law, that a ship insured for a homeward voyage "at and from" any of the West India Islands, is protected by the word "at" in going from port to port of the island.¹

Secus, if otherwise described.

In these cases, the general word by which the *terminus a quo* of the homeward voyage is described, comprehends all ports and places in the island or district named; the construction of course would be different if the *terminus a quo* were otherwise described in the policy. Thus, if the policy were on the ship "at and from the ship's port of loading" in Jamaica, that would restrict the commencement of the risk to one particular port in the island.²

Continuance and termination of risk on ship.

So much for the commencement of the risk on ship; its continuance is expressly stipulated in all our common policies to be "until the ship hath moored at anchor twenty-four hours in good safety."

Foreign Law.

In Spain and Portugal the rule is the same;³ in France, by the Code de Commerce, the risk ends "when the ship is anchored or moored to the quay of the port of discharge."⁴ In most of the ordinances and policies of Germany, Holland, and the north of Europe, the risk on the ship is decreed, or stipulated to continue either until the ship has entirely discharged her cargo, or for a certain specified number of days after her arrival.⁵

Alteration proposed by Magens.

Magens advises, for the protection of the ship while unloading, the insertion of a clause prolonging the continuance of the risk for twenty-one working days after commencing to discharge.⁶ In the absence of any special clause of this kind,

¹ Cruickshank v. Janson, 2 Taunt. 301; Warre v. Miller, 4 B. & Cr. 538.

² Per Patteson, J., in Brown v. Tayleur, 4 A. & E. 241, 248.

³ For the older laws, see 2 Benecke, pp. 234-238; for the more recent, Id. par Nolte, vol. i. pp. 268-671.

⁴ Code de Commerce, art. 382, 341.

⁵ By the German Code it continues until the discharge of her cargo, art. 826. The older ordinances are collected by Magens, vol. ii. passim, and by Benecke, old and new quâ supra, p. 394.

⁶ Magens, 47; accord. Mercantile Marine Ins. Co. v. Titherington, 34 L. J. (Q. B.) 11.

the underwriters, in an ordinary policy, are not responsible for any loss that happens after the ship has once been "moored twenty-four hours in good safety."

The question has generally been what constitutes a mooring in good safety.

What is a
"mooring in
good safety?"

The effect of the cases appears to be, that a ship is not considered to have been moored for twenty-four hours in good safety, unless moored for that space of time in the harbour of her port of discharge: 1—in such a state of physical safety that she can keep afloat while her cargo is being unloaded; 2—in such a state of political safety as not to have been subjected during that time to any embargo, seizure, or capture on the part of the government of the port or of strangers; and, 3—under such circumstances as to have had an opportunity of unloading and discharging.

1. As to her state of physical safety during the period of twenty-four hours. 1. Physical safety.

A ship arrived at Demerara, her port of destination, a perfect wreck, having received her death-wound at sea, and was with the utmost difficulty kept afloat by lashing her to a hulk, till all the people on board were landed, and a few days afterwards, in trying to move her, she sank in the harbour; Lord Kenyon held, that the risk was still continuing when she sunk, "for though arrived at Demerara she was never moored twenty-four hours, nor a moment in safety."¹

Shaw v.
Felton.

2. As to her state of political safety during that time.

2. Political
safety.
Minett v.
Anderson.

An English ship, the day after arrival at Rouen, was laid under an embargo then existing there against all English ships, and her captain and crew treated as prisoners of war; Lord Kenyon held, that the risk was still continuing, for she could not be said, under the circumstances, to have been twenty-four hours, or even a minute, moored in safety,

¹ Shawe v. Felton, 2 East, 109.

having been immediately she entered the port, to all intents and purposes, captured by the French.¹

*Horneyer v.
Lushington.*

Where immediately on the ship's arrival at Riga (which was her port of discharge under the policy), her hatches were sealed down and her papers sent to St. Petersburg to be examined, on which examination the ship and cargo were seized, and afterwards condemned; it was held, that as there had been an incipient seizure immediately on the ship's arrival, which ended in condemnation, this was not a mooring twenty-four hours in good safety.²

But our Courts have refused to regard a seizure as having a relation back to the moment of arrival merely on the ground of the ship's liability to seizure from that moment onwards.

*Lockyer v.
Offley.*

A ship insured, "from Hamburg to London," had become liable to forfeiture under our revenue laws for smuggling committed during the voyage; she arrived at London on the 1st of September, was not seized by the revenue officers for the said smuggling till the 27th, having been all that time safe at her moorings in the river Thames, and the Court held that the risk was at an end twenty-four hours after the ship's arrival.³

3. So moored as to have an opportunity of unloading and discharging.

3. The ship must have been so moored as to have an opportunity of unloading and discharging; otherwise, whatever time may have elapsed since her arrival, the risk will be deemed to be still continuing.

*Waples v.
Eames.*

A ship from Leghorn to London arrived on the 8th July at Fresh Wharf and moored, but, that same day, was ordered back into quarantine for a fortnight, and her crew thereupon deserted her; she did not ultimately get into quarantine till the 30th July, having in the meantime remained at her moorings; and was burnt on the 23rd August, before she could get permission to leave the quarantine ground. The Court held that, though so long at her moorings before going

¹ *Minett v. Anderson, Peake's R.* 46.
211.

² *Horneyer v. Lushington*, 15 East,

³ *Lockyer v. Offley*, 1 T. R. 252.

into quarantine, she had not been there in good safety, as that must mean an opportunity of unloading and discharging.¹

The captain of a tea-laden ship from Sierra Leone to London, having got orders from his owners to take the ship into the King's Dock at Deptford, brought her up the river for that purpose, and on Sunday evening, the 18th of February, arrived off the dock gates; not being able then to enter, he lashed her to a King's ship outside the gates, and on Monday morning, and for several days until the 27th, no attempt to get her into the dock could be made in consequence of the state of the river from drift ice; but on that day, while she was being warped towards the dock, the rope broke and the ship went ashore near the dock gates and was totally lost. Lord Tenterden held, that under the orders given to the captain the King's Dock must be considered her place of discharge, and, consequently, as she had never been there, she had not been moored twenty-four hours in good safety, and so the risk continued.²

*Samuel v.
Royal Exch.
Ass. Co.*

On the contrary, if the ship be moored in such a place, and under such circumstances that she has only to wait till her turn of unloading comes, without again unmooring, this is held a mooring in good safety.

A ship insured to London arrived at the wharf where it was intended she should unload, but was laid on the outside of the tier of shipping for want of room to lay her inside, and she remained so moored and lashed to other vessels for seven days, when she was forced adrift by the ice and lost; Lord Kenyon held, that she had been moored twenty-four hours in good safety.³

*Angerstein v.
Bell.*

A case illustrating more than one of these points was that

*Lidgett v.
Secretan.*

¹ *Waples v. Eames*, 2 Str. 1243.

² *Samuel v. Royal Exch. Ass. Co.*, 8 B. & Cr. 119. See the case of *Zacharie v. New Orleans Ins. Co.*, 5 Martin's Louisiana R. N. S. 637, and *Dickey*

v. Unit. Ins. Co., 11 Johns. R. 358, cited 1 Phillips, no. 968.

³ *Angerstein v. Bell*, 1 Park, Ins. 54; 1 Marshall, Ins. 263.

of *The Charlemagne*,¹ insured "at and from London to Calcutta, and for thirty days after arrival;" the words "until she have moored at anchor twenty-four hours in good safety" still remaining part of the policy. She sailed from London on the 22nd of July, 1866, with troops on board, and on the 24th of October, while on her voyage, she struck on a reef, and thereby suffered such damage that her pumps required to be kept constantly going, and her steering gear was materially injured. In this condition, on the 28th of October, she came to anchor in the river opposite Calcutta, within the harbour of Calcutta, at a place where vessels commonly discharge their cargo, and there she safely completed the discharge of her cargo on the 8th of November, sixteen lascars being employed with a fire engine in pumping the water out of her, until she lightened sufficiently to lessen the leak and to place the water under control of the ship's pumps. The ship while in this position was exposed to the perils common to all vessels so anchored, viz., the strong currents and the bore in the Hooghly, aggravated in her case by the bad condition of her steering gear if she had broken adrift. She was then placed in a dry dock for repairs, and while there, and after the lapse of twenty-four hours, and more than thirty days in addition, she was completely destroyed by fire.

It was unnecessary in the events which had happened to determine in this case whether under this policy the thirty days were to be reckoned from the arrival of the vessel at Calcutta, or from her having moored at anchor twenty-four hours in good safety. Bovill, C. J., delivering the judgment, said:—"Assuming, then, that the thirty days are to be reckoned from the time of the ship being moored for twenty-four hours in good safety, the question arises, What is the meaning of those words in such a policy? We are of opinion that the meaning is not, as has been contended, that the moorings are safe, but that the words

¹ *Lidgett v. Secretan*, L. R., 5 C. P. 190.

refer to the ship being in safety. The words cannot mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage; otherwise, the loss of a mast or even a spar, a sail, or rope, though the vessel was perfectly fit to keep not only the river but the sea, would, contrary to all the ordinary meaning of language, prevent her from being considered as in safety. So, on the other hand, the words would not, in our opinion, be satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, or by a mere temporary mooring. We think, also, that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours, after having moored in good safety, clearly implies that, notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against. In the present case the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and she was able to keep afloat, and did keep afloat as a ship more than twenty-four hours after being moored, by exerting the means within the power of the captain. She arrived and moored at the ordinary place for unloading, and was so moored as a ship in the possession or control of her owners for more than twenty-four hours; and she remained as a ship and in possession of her owners for more than thirty days after the lapse of the twenty-four hours before described, and until the time of the fire by which she was totally lost." It was therefore held, that the total loss which had occurred was not within the period of risk covered by the outward policy, and that only the average loss was recoverable under it.¹

¹ *Lidgett v. Secretan*, L. R., 5 C. P. 190, 198, 199, 200. See this case considered with reference to another policy on a different point (L. R., 6 C. P. 616), *post*, Part III. c. 6.

Arrival. In case the policy were to a place, say "Mauritius, and for thirty days after arrival," it must become a question whether under the circumstances there had been any arrival within the meaning of the policy, and if any, when, and that would be a question of fact for the jury.¹

Whitwell v. Harrison.

A ship insured from Liverpool to Quebec and back to a port in the United Kingdom, was, by the charter-party, to proceed to Wallasey Pool, on the river Mersey, or as near thereto as she could safely get. She arrived in the Mersey on the 4th September, and was towed up next morning abreast of Wallasey Pool, where, as she could not enter the Pool by reason of her great draught of water, the captain anchored and reported the vessel at Liverpool. He engaged lumpers and discharged the crew; and after the deck loading, and also a considerable portion of the cargo, had been unloaded, the ship, on the 14th September, fell over and sustained injury. The captain had always intended to take the vessel into Wallasey Pool with as much of the cargo as she could safely carry. The Court of Exchequer nevertheless held, that the ship had moored twenty-four hours in safety, and consequently that the underwriters were not liable.²

Duration of risk, without ordinary clause.

If there were no such clause as that which we are discussing in the policy, the risk on the ship would continue until safe arrival at her port of destination, but would cease immediately on being at her moorings.³

When insured to an island.

What, under a policy to an island, or to a district comprising several ports, at all of which the ship may discharge,

¹ *Lindsay v. Janson*, 28 L. J. (Ex.) 315; 4 H. & N. 699.

² *Whitwell v. Harrison*, 2 Exch. 127; 18 L. J. (Ex.) 465.

³ Anonymous case, *Skin. R.* 243. See also *Dickey v. United Ins. Co.*,

11 Johnson's cases, 358, cited 1 Phillips, *Ins.* no. 968. "I quite agree with the statement in Arnould:" per Bramwell, B., in *Stone v. Marine Ins. Co.*, *Ocean, Limited*, of Gothenburg, 1 Exch. Div. 81, 85.

is the duration of the outward risk on ship so insured? This mode of insurance is exceedingly common in the West India trade. Circumstances, which can only be ascertained on arrival, may make it expedient for the ship to touch at more or fewer of these ports, or to visit them in any order which may seem most suitable on the spot.

It was decided in the time of Lord Mansfield, and has ever since been a clear point in insurance law, that the risk on the outward voyage upon a ship so insured, terminates immediately after the ship has moored for twenty-four hours in safety at the first port in the island at which she stops to discharge the bulk of her cargo, and that afterwards, if lost in coasting round the island, it is the underwriters on the homeward policy, if any, who are alone liable.¹

The outward risk on ships so insured.

Nor does it make any difference as to the liability of the underwriters on the outward policy on ship, that a small part of the outward cargo is still on board at the time of loss. Thus, in *Leigh v. Mather*, as the ship had moored and unloaded the great bulk of her outward cargo at Montego Bay, in the island of Jamaica, the outward risk on the ship was held to be at an end, notwithstanding a small part was sent round to the port of St. Ann's in the same island.²

A ship insured "to Martinique and all or any of the Windward and Leeward Islands, with liberty to touch at any ports or places whatsoever, to take on board and land goods, stores," &c., arrived at Martinique, where the captain disposed of all his outward cargo, except a small quantity of lime and bricks, with which he sailed for, and arrived at Antigua, and there remained for about five weeks, partly, as he said, to dispose of the remnant of the outward cargo, and partly to procure a homeward cargo; at the end of this time she went down in a hurricane, with the lime and bricks still

Inglis v. Vaux.

¹ *Camden v. Cowley*, 1 W. Bl. 417, 301.
418; *Barrass v. London Ass. Co.*, 1
Park. Ins. 74; 1 Marshall, Ins. 266; 266.
Cruickshank v. Janson, 2 Taunt.

² *Leigh v. Mather*, 1 Marshall, Ins.

on board; and Lord Ellenborough held the underwriters on the outward policy not liable for this loss, as the risk on the ship came to an end, at all events, directly the disposal of the outward cargo at Antigua ceased to be the sole object of the captain's stay there.¹

Moore v.
Taylor.

A ship was insured for a trading voyage from the West Indies to this country and back, in the following terms:—
“At and from St. Vincent's, Barbadoes, and all or any other of the West India Islands (Jamaica and St. Domingo excepted), to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back again to Barbadoes and all or any other West India Islands (Jamaica and St. Domingo excepted), until the ship should be arrived at her final port as aforesaid, with liberty to the ship in that voyage to proceed to and touch and stay at any port or places whatsoever, and to load and unload goods at all places she might call at.” Having sailed to Liverpool, she there took on board for the return voyage, amongst other things, a quantity of coals and bricks; which, in weight, formed about one-third of the whole cargo, but in value not above one-eighteenth. She arrived at Barbadoes, and disposed of all her cargo except the coals and bricks; with these on board, and also some empty sugar casks loaded on board at Barbadoes, she was ordered to proceed to Berbice for the purpose of bringing back a cargo, when, just before sailing, she was lost by a hurricane off Barbadoes.

There was some doubt on the evidence whether the coals and bricks were on board as ballast, or whether they formed part of the outward cargo, and were intended to be disposed of at Berbice. Lord Denman directed the jury to find for the defendant (*i. e.*, that the risk on the ship was at an end at the time of loss) if they thought that the cargo had been substantially discharged at Barbadoes: the jury thought that it had, and found accordingly for the defendant. The Court *in banc* held this direction right, and, though they

¹ *Inglis v. Vaux*, 3 Camp. 437.

seemed to think that the jury had drawn an incorrect conclusion from the facts, refused to disturb the verdict.¹

It has been held in the United States that under a policy on ship to any West India Island named, say Barbadoes, "and a market," the ship will be protected in going *bonâ fide* from island to island till her cargo is disposed of.²

To an island and a market.

The special jury, in the case of *Leigh v. Mather*, stated, and Lord Kenyon admitted, that if a ship, insured from A. to B. put into a port of distress, and there disposed of part of her cargo, the risk on the ship does not terminate there, but continues until her arrival at some port at which it was originally contemplated that she should discharge her cargo in whole or in part.³

Effect of discharging small part only.

This appears to be a very just rule, and is illustrated and confirmed in the jurisprudence of the United States. Where a ship was insured from the United States to Europe and back "to her port of discharge in the United States," it was held that the landing of 150 boxes of lemons at New York, a port into which the ship had put to wait for orders, the lemons, moreover, being in a perishing state and likely to be spoiled, did not make New York the port of discharge under this policy, so as to terminate there the risk on the ship.⁴ In the same Court, where a ship, under the same form of policy, having put into New York for orders, and being directed to proceed up the Connecticut River to Middletown, necessarily landed about 3000 bushels of salt into lighters at New York to be carried up to Middletown, and then herself proceeded thither with the residue of the cargo, it was held that, notwithstanding this necessary discharge of part of the cargo there, New York was only the port of arrival, and not

¹ *Moore v. Taylor*, 1 A. & E. 25.

³ *Leigh v. Mather*, 1 Esp. 412.

² *Maxwell v. Robinson*, 1 Johnson's Rep. 333, cited 1 Phillips, Ins. no. 960. So, *Deblois v. Ocean Ins. Co.*, 16 Pick. (Mass.) 303.

⁴ *Sage v. Middletown Ins. Co.*, 1 Connecticut Rep. 239; 1 Phillips, Ins. no. 962.

the port of discharge, and therefore that the risk continued to Middletown.¹

Result.

From these cases it evidently is not the fact of unloading at any port into which the ship runs in the course of the voyage, that puts an end to the risk on the ship, when insured either generally to an island or country, or to her port or ports of discharge. It is not until she has moored twenty-four hours in good safety at the first port at which she was intended to unload, and at which the master actually breaks bulk for the purpose of unloading, either the whole or the greater part of the cargo, that the risk on the ship will be held to terminate.

If, indeed, the port she puts into be one to which she was originally destined, then, if she be lost after having moored there twenty-four hours in good safety, the risk on the ship will, no doubt, be at an end, even although she has not actually broken bulk, but be only preparing to unload her cargo at the time of the loss.

On the other hand, if the ship enter a port with only a contingent purpose to unload there in case circumstances should render it expedient, it has been decided in the United States that such port shall not be deemed her port of discharge, so as to terminate the risk on the ship by her mooring there for twenty-four hours in good safety. A vessel, insured from the West Indies "to her port of discharge in the United States," put into Savannah in Georgia, where the master intended to discharge his cargo if the market was favourable; but, not finding it so, he resolved to proceed to Boston, and accordingly, after doing repairs at Savannah, but without breaking bulk there, he sailed for Boston, and was lost; the Court in Massachusetts held, and apparently on very sound principles, that the risk on the ship, under the circumstances, continued to Boston.² But where the insurance was to

¹ *King v. Middletown Ins. Co.*,
1 Connecticut Rep. 184; 1 Phillips,
Ins. no. 962.

² *Lapham v. Atlas Ins. Co.*, 24
Pickering's Mass. Rep. 1. See 1
Phillips, Ins. no. 962; 3 Kent. Com.,

"Bilboa or a port of discharge," and the ship had put into Bilboa and discharged part of her cargo, and then sailed to Lisbon; it was held, in the United States, that the outward risk ended at Bilboa.¹

The general rule in France, as to the duration of the outward, and commencement of the homeward risk on a ship insured for the West India trade, seems to be substantially the same as our own; viz., that the risk on the ship under the outward policy continues till her arrival at the port of substantial discharge, and cannot be extended beyond that, merely because an inconsiderable portion of the outward cargo may still be on board after she has sailed from that port, or at the time of loss.²

Law of
France.

Thus, where a ship, under a policy on the French West India trade, by which the risk was expressed to continue "until the whole cargo should be discharged and landed in good safety," touched at St. Louis in St. Domingo, commenced the sale of her outward cargo, and then proceeded to Aux Cayes in the same island, where she completed the sale of all but one package of hats, and whilst sailing thence for Port-au-Prince was lost with the hats on board; the underwriters on the outward policy were held by the French Courts not liable for this loss, on the ground that the risk had terminated at Aux Cayes, the port of substantial discharge.³

But where a ship, similarly insured, having touched at Jacmel, St. Domingo, and there sold a small portion of her outward, and taken in a small portion (twenty-six bales of cotton) of her return cargo, was lost while sailing from Jacmel to St. Louis, in order, partly to sell the residue of her outward, and partly to complete the loading of her homeward cargo; it was held, that the ship, at the time of

309, note. See also the case of *Coolidge v. Gray*, 8 Mass. R. 527, cited 1 Phillips, Ins. no. 962.

¹ *Stephens v. Beverly Ins. Co.*, cited 1 Phillips, no. 963. "The plain

meaning of the expression," said the Chief Justice, "is to Bilboa or some other port of discharge."

² 2 Emerigon, c. xiii. s. 18, p. 108.

³ 2 Emerigon, 109.

loss, was still at risk under the outward policy, the great bulk of the outward cargo still remaining on board.¹

As it seems to be repugnant to French law that the outward and homeward policies on ship should be concurrent, Emerigon proceeds to consider what rules will enable the practitioner to determine when the one ceases and the other attaches.² No such principle exists in the law of England; so that if the outward policy be "until moored twenty-four hours in good safety," and the homeward policy be "at and from" the same port, both policies may well be concurrent during the last four-and-twenty hours.

Port or ports
of discharge.

Questions have arisen as to the duration of the risk on the ship when she is insured "to her port of discharge," or, "to her port or ports of discharge," or to a named place "and her port of discharge," or "to her final port of discharge or destination."

In one of the earlier English cases it was said, that the ship's port of discharge means that at which it was originally intended that the goods should be delivered;³ and it has been held in the United States, apparently on good grounds, that the risk on the ship under an insurance "to her port of discharge" (in the singular) terminates twenty-four hours after she is moored in safety at the port where, in pursuance of the original intention of the parties to the policy, she first breaks bulk for the purpose of discharging her cargo.⁴

Where the insurance is to her "port or ports of discharge"

¹ 2 Emerigon, p. 109, 110; see also p. 114.

² See 2 Emerigon, c. xiii. s. 20, and note by Boulay-Paty. So Boulay-Paty, *Droit Mar.* t. iii. 423-426. It is true, Emerigon assumes that the agreements in the policies may be found "en concours," and asks whether "la perte est-elle commune aux assureurs des polices respectives?" But the rules he lays down

for discriminating between the respective assurers as to liability, and the editor's neglect of M. Pazery's query—why not divide the loss, evince a repugnance on their part to conceive of the liability being concurrent and the loss common.

³ *Clason v. Simmonds*, 6 T. R. 533, note.

⁴ *Coolidge v. Gray*, 8 Mass. R. 527; 1 Phillips, Ins. no. 962.

in the alternative, the duration of the risk could not, it would seem, be confined to the first port at which she has broken bulk and discharged the cargo to any amount, however trifling, but would be extended until twenty-four hours after her arrival at that port, where, in fact, she substantially discharges her cargo, *i. e.*, the great bulk of it.¹

This is unquestionably the rule when the ship is insured “to her final port of discharge,” as appears by the following cases:—

Final port of discharge.

A ship insured “till her safe arrival at her last port of discharge in the East Indies or China,” unloaded all her cargo at Madras, and was afterwards lost on her way to Bengal; the Court held, that the risk on the ship had ended before the time of the loss; for by the true interpretation of the policy, the last port of discharge was not that where the ship might have been originally destined to discharge any part of her cargo, but that where she actually did discharge the whole of it.²

Moffat v. Ward.

In this case the whole cargo had been discharged at Madras: in that which follows, only a part of the cargo was unloaded there, and the residue, intended for an ulterior port, was still on board at the time of the loss.

A ship, insured “from London to Madras and Bengal, or the ship’s last port of discharge of her Europe cargo beyond the Cape of Good Hope,” was, to the knowledge of the underwriters at the time of subscribing the policy, destined for China; on arriving at Madras she unloaded a considerable part of her cargo there, but still had on board all that part of it which had been originally destined for China, when she perished by a hurricane in Madras roads. Lord Mansfield told the jury to find for the plaintiffs, for he held that the risk on the ship, under this policy and these circumstances, continued till the ship’s arrival at China.³

Preston v. Greenwood.

¹ See ante, p. 419.

³ Preston v. Greenwood, 4 Dougl.

² Moffat v. Ward, 4 Dougl. 29, 28, 33; see also Moore v. Taylor, 1 note (a), 31, note (b). A. & E. 25.

When it is illegal to enter the last port of discharge.

If a ship insured to port or ports, "until arrival at her last port of discharge," elects to put into some other port because it would be illegal by the laws of war to continue her voyage to the port of original destination, and disposes of a considerable part of her cargo in the substituted port, the risk on the ship ends after she has moored there twenty-four hours, even though the captain may not at the time of loss have entirely abandoned the intention of ultimately proceeding to the place of his original destination.

Brown v. Vigne.

A ship was insured "at and from London to any port or ports in the River Plate, until her arrival at her last port of discharge in the River Plate." There are three ports in the River Plate, which are reached in the following order by a ship arriving from England: 1. Maldonado; 2. Monte Video; 3. Buenos Ayres. The captain, on sailing from England, had intended to proceed to Buenos Ayres, but on his arrival in the River Plate, learning that Buenos Ayres was in the hands of the Spaniards, then at war with this country, he sailed past Maldonado, and put into Monte Video, which was then occupied by the English. His intention, on putting into Monte Video, was to land and sell his whole cargo and finish the voyage at that place, if he found the markets favourable; finding the sale, however, duller than he expected, he had not given up all thoughts of proceeding on to Buenos Ayres for a market, with that portion of the cargo which he could not sell at Monte Video, when his ship was fouled in Monte Video harbour, and received the damage, to recover which the underwriter was now sued under this policy. The Court held that the plaintiff could not recover, the risk on the ship having come to an end after she had been safely moored for twenty-four hours in Monte Video.¹

In the course of the argument Bayley, J., intimated that the words "last port of discharge," must mean "the last practicable friendly port of discharge;" just as in an insurance on a ship "from Liverpool to any of the Windward

¹ Brown v. Vigne, 12 East, 283.

or Leeward Isles," Lord Kenyon had previously held that the meaning of such policy must be to any of such isles as were friendly; for that a hostile port could not be in the contemplation of the parties at the time the policy was effected.¹

It will be observed, that in this case the port originally contemplated as the final port of discharge, was in a state of open hostility at the time the vessel reached the River Plate; so that it would have been absolutely illegal for her to have proceeded to such port: this is very different from the case of a mere temporary obstruction, or one in which, though there might be danger, yet there would be no illegality in proceeding to the final port; and that constitutes the point of distinction between this case and that of *Oliverson v. Brightman*.²

If a ship entirely abandons the voyage insured, and finally gives up all hope of proceeding to the port of her original destination, the risk on the ship is at an end immediately that determination is definitely formed. On the other hand, if the ship, yielding to the irresistible force of present circumstances, merely put back or lie by for a time, with the intention of ultimately proceeding to the original terminus, she is deemed to be still on the voyage insured, and the risk continues till her arrival at the final terminus. But in order to this being so held, the obstruction must be temporary only in its nature, and the ultimate point of destination continue the same.

If the ship finally abandons all intention of proceeding to the port of original destination.

A ship insured to a port in the Baltic, finding it blocked up with ice, took shelter for the winter in a place as near to it as she could safely go, and waited till the spring, when, on the first thaw, she sailed for it again; the risk on the ship was held to continue till her arrival there.³

¹ *Neilson v. Delacour*, 2 Esp. 619.

² *Oliverson v. Brightman*, 8 Q. B. 781, ante, p. 400.

³ Per Lord Ellenborough, C. J.,

citing the case in the judgment in *Blackenhagen v. London Ass. Co.*, 1 Camp. 454; and in *Brown v. Vigne*, 12 East, 283, 286.

Blackenhagen
v. London
Assurance
Company.

But where a ship insured from London to Revel, finding an embargo at Revel, sailed back from the Baltic by orders of a British man-of-war to Copenhagen Roads, and then, entirely abandoning her voyage, accompanied the fleet to England; Lord Ellenborough nonsuited the plaintiff on the ground that the risk had terminated under this policy, at all events, directly the ship had put about for England in Copenhagen Roads.¹

His Lordship, however, remarked that had the ship been coming home as the best means of getting finally to Revel, and there had been a possibility of her accomplishing that object when the loss happened, she might still have been considered in the course of the voyage insured; but that all thought of completing her original voyage seemed to have been abandoned when she sailed home from Copenhagen with the fleet.²

Parkin v.
Tunno.

In such cases, in fact, the risk may be held to continue on the ship during the whole period in which she can be fairly considered as taking measures with a view to ultimately arriving at the port of destination; but she will not be protected if, when turned away or forced to desist from proceeding to her original port, because of its being in the hands of the enemy, she forthwith prosecutes a new voyage to the nearest friendly port, even though it be a voyage of necessity.³

Duration
prolonged by
usage.

The usages in the East India Company's trade may still be referred to for the purposes of illustration. By the usual course of that trade, the Company's ships on arriving out were liable to be employed at the discretion of the different presidential governments in intermediate voyages, or in what was called the country trade; their charter-parties stipulated permission to prolong the ship's stay for a year or more; and their policies adapted to this usage were uniformly held, in the absence of restricting clauses, to cover all intermediate

¹ Blackenhagen v. London Ass.
Co., 1 Camp. 454.

² Ibid.

³ Parkin v. Tunno, 11 East, 22.

voyages in the Indian seas.¹ So great, indeed, was the influence of usage in the construction of these policies, that the clause "to touch, stay, and trade at any ports whatsoever," or this clause, omitting the words "and to trade," sufficed, with the usage, to protect the ship while engaged on one or even a second country voyage for trading purposes.²

It was formerly a rule in the East India trade, that a voyage to China was not to be held included in a policy on a Company's ship, unless China were expressly named in the instrument; where, however, it clearly appeared that the ship's destination for China was publicly known at the India House, and that the premium was the same as it would have been on a China voyage, although the insurance in terms was only "from London to Madras and Bengal, or the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope," Lord Mansfield held that although the word *China* was not introduced into the policy, yet, as the words in themselves certainly extended to China, the risk, under the circumstances, must be considered as continuing on the ship till her arrival in China, and the underwriters as having contemplated the ship's proceeding thither when they subscribed the policy.³

Preston v.
Greenwood.

If the assured and the consignees of cargo agree to substitute an earlier port for the port of delivery, the risk will end there. A ship insured "from Boston to Tonningen," was compelled, by stress of weather, to enter the Elbe for safety, and proceed up to Gluckstadt, where the consignees consented to receive the cargo, and did receive it: it was held in the United States, that there was an end of the risk on the ship at that port.⁴ But the risk on a ship insured for a

Earlier termination by
consent.

¹ *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Dougl. 419; 1 Park, Ins. 104; 1 Marshall, Ins. 273.

² *Farquharson v. Hunter*, 1 Park, Ins. 105; 1 Marshall, Ins. 274; *Gregory v. Christie*, *quâd supra*.

³ *Preston v. Greenwood*, 4 Dougl. 28. Buller, J., had on a former trial directed the jury to find for the defendants.

⁴ *Shapley v. Tappan*, 9 Mass. R. 20, cited 1 Phillips, Ins. no. 964.

Exception of
fishing
voyages.

fishing voyage cannot be terminated by a portion of the cargo or produce of the voyage being sent home by another ship, and arriving in safety before the loss.¹

Stone v.
Marine Ins.
Co., Ocean
Limited of
Gothenburg.

In the case of a ship reinsured "from Liverpool to Philadelphia and back to the United Kingdom," it was found that a large part of her homeward cargo had been sold by the charterer to persons in Antwerp, and the underwriters, at request of the assured, endorsed the policy thus: "In consideration of an additional premium of 7s. 6d. per cent., it is hereby agreed to allow the vessel to go to Antwerp." The question was as to the effect of this memorandum under the following circumstances. The vessel, without calling at the United Kingdom, had arrived in the outer dock on her way into the inner dock of Antwerp, when the captain was ordered by telegraph to Leith. He sailed for Leith as soon as he could, and on his way thither his ship was totally lost by perils of the seas. It was held that the memorandum construed with the policy might mean to Antwerp by way of the United Kingdom, but whether this or not, that Antwerp was certainly to be taken to be the final port of her destination, and consequently that the ship was not protected by the policy at the time of her loss.²

Continuance
of risk by
usage.

Generally speaking, the underwriter on a sea-policy only insures against sea risks; consequently, in the absence of usage to modify such a policy, he is not responsible for a loss that takes place on shore.³ Usage, however, in this, as in other cases, may determine the rights of parties under policies of insurance; and if it can be shown that ship's furniture is regularly landed at certain ports on the voyage by the usage of trade, it is then as much within the

¹ Phillips v. Champion, 6 Taunt. 3; 1 Marshall's R. 402, S. C. In Taunton the insurance is stated to have been "on ship," in Marshall "on freight:" the former is probably correct. The Court dismissed the argument against the liability of the

underwriter with ridicule, which, indeed, it deserved.

² Stone v. Marine Ins. Co., Ocean Limited of Gothenburg, 1 Exch. Div. 81.

³ Harrison v. Ellis, 7 E. & B. 465; 26 L. J. (Q. B.) 239.

protection of a policy on ship, while thus put on shore, according to the course of trade, as when on board the ship herself.¹

A policy on ship "to any port or ports in the South or North Pacific Oceans, in any order backwards and forwards, and during thirty days' stay in her last port of discharge," proceeded in the usual words of the printed form "upon the said ship until she hath moored at anchor twenty-four hours in good safety." After the expiration of thirty days from the ship's arrival, and during the currency of the next four-and-twenty hours, a total loss of the ship took place, which was held to be within the risk covered by the policy. Prolongation
by oversight.

In the argument for the insurer in this case, a subtle construction of the policy was suggested, only admissible on the assumption that the stipulated thirty days preceded the usual twenty-four hours at anchor. The order of precedence in respect of these two stipulated periods in prolongation of the risk became in that case, as it may become in others, of the very essence of the contract. The Court said, "We must construe the policy so as to make all the parts of it available, and we cannot see why we should not read it as meaning that the thirty days should run from the expiration of the twenty-four hours after the ship had moored at anchor [in good safety]." ²

In the case of time policies, usually expressed to begin from the meridian of such a day, the calculation of time for the end of the risk must be in accordance with the meridian of the place where the policy was executed, otherwise the ship, by sailing eastward or westward of that place, would appear to shorten or prolong the duration of the risk. On time
policies.

¹ *Pelly v. Royal Exchange Ass. Co.*, 1 Burr. 341; *Brough v. Whitmore*, 4 T. R. 206.

² *The Mercantile Marine Ins. Co. v. Titherington*, 34 L. J. (Q. B.) 11; 5 B. & S. 765. I have added the

words within brackets from the policy as properly expressing the meaning and intention of the Court, because they may be of vital importance in some cases. See *Lidgett v. Secretan*, L. R., 5 C. P. 190.

Duration of
risk on
freight.

We now come to discuss the subject of this chapter in relation to freight. The object of an insurance on freight is to protect the shipowner from being deprived, by any of the perils insured against, of the profits he would otherwise acquire under the affreightment of his ship, or by the carriage of his own goods, or the goods of another.

Commence-
ment of risk.

In considering at what moment, or under what circumstances, the risk on freight commences, it is material to bear in mind the two general significations of this word;—the first as being the reward which is earned by the carriage on shipboard of another's goods, the proper signification of the word in the law of shipping:—and the second as being the stipulated hire of a ship or part of it for performance of the contract in the charter-party, called by us, shortly, the chartered hire of the ship. There is a third use of the word in insurance law to designate the accession of value accruing to the shipowner by the carriage of his own goods in his own ship; but for our present purpose that use may be neglected here. In order to avoid confusion we shall deal with this subject in relation to each of these two general significations of freight severally and apart.

On freight
proper.

Freight, in the first of these senses, becomes a perfected right upon the carriage being completed by delivery of the goods, that is to say, in abstract terms, upon the relation in fact and law between the ship and the goods which was formed for a certain purpose being dissolved on the accomplishment of that purpose. Consequently an insurable interest in such freight first arises, the risk then commences, an inchoate title to this freight accrues when ship and goods are for the first time so placed in this relation in fact and law that nothing but the intervention of the perils insured against can prevent the accomplishment of the purpose contemplated by means of it.¹ Whether this relation be

¹ See the case of, and observations by Lord Ellenborough on, *Forbes v. Aspinall*, 13 East, 323; *Williamson*

v. Innes, cited 8 Bing. 81, note; *Warre v. Miller*, 4 B. & Cr. 538.

constituted, and when, are questions of considerable nicety, to be determined on the circumstances in each case severally as it arises; but they admit of being illustrated, and much assistance may be obtained from cases that have already been the subject of judicial decision.

For instance, if the goods are actually on board, such a relation no doubt subsists between ship and goods, that an insurable interest in freight is in existence and the policy on freight has attached. It by no means follows, however, that if the goods are not actually on board, no insurable interest on freight can have accrued. Such indeed was the *ratio decidendi* in an old case, of which the facts appear to have been such as to justify the decision, but upon a different principle.

In *Tonge v. Watts*,¹ it seems that there was a cargo ready to be shipped. The vessel herself was being careened with a view to the voyage; but she was lost by a sudden tempest before any cargo was shipped or she was ready to receive it. In that case, although the cargo was ready, the ship was not, and consequently both were not then in fact and law in that relation proper and necessary to the earning of freight, so that the risk had not commenced. This, as the law now stands, seems to be the principle of the case, and not the absence of the goods on board, although that is said to have been the *ratio decidendi*. Tonge v.
Watts.

A learned text writer of America has formulated the rule upon this subject in these terms, that is to say, that the risk commences when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses or taken steps towards earning the freight.² And a learned English judge expressly adopts the part of it as to incurring expense as the statement of the rule of law in the case supposed.³ It would appear that this is rather the *ratio* of a particular decision,

¹ *Tonge v. Watts*, 2 Str. 1251.

² 1 Phillips, Ins. no. 328.

³ Blackburn, J., in *Barber v. Fleming*, L. R., 5 Q. B. 59, 71.

than the statement of a general rule.¹ I have cited it, as an illustration of a possible case of insurable interest, though of very little value in fixing the commencement of that interest and of the risk; indeed, it seems quite misleading in such a state of facts as those in *Tonge v. Watts*.

Another way of stating the rule on this subject is this:—That where a cargo has been contracted for, and is ready to be shipped on board at the time of the loss, and the ship being otherwise in a condition to receive the cargo, is only prevented from doing so by the intervention of the perils insured against, the policy on freight has attached, and the underwriters are liable for the loss of the whole freight that would have been earned on the voyage, even though no part of the cargo has ever been shipped on board at all.²

*Montgomery
v. Eggington.*

The first case which extended the rule laid down by Lee, C. J., in *Tonge v. Watts*, was *Montgomery v. Eggington*, which established that, where part of the goods were actually on board at the time of the loss, and all were ready to be shipped, the policy attached on the whole freight. It was an insurance on freight valued at 1500*l.*; when only 500*l.* of freight was on board, the ship was driven from her moorings and lost, but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time of the loss. The jury, under the direction of Lord Kenyon, found a verdict for the whole sum, which the Court of King's Bench, on motion for a new trial, refused to disturb.³

*Parke v.
Hebson.*

On the same principle, under a policy on the freight of a general ship which was to complete her lading at a number

¹ This view accords with a very usual practice of Mr. Phillips, rather to extract the ratio of a particular decision and give it in a separate paragraph than to exhibit it in the statement of the case on the one hand, or on the other to formulate a principle in such terms that it shall serve as a general rule.

² *Montgomery v. Eggington*, 3 T. R. 362; *Truscott v. Christie*, 2 B. & B. 320; *Parke v. Hebson*, *ibid.* 329; *Warre v. Miller*, 4 B. & Cr. 538; *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 Bing. N. C. 519.

³ *Montgomery v. Eggington*, 3 T. R. 362.

of different ports and to be paid freight for the same according to the terms usual in the colonial trade, the ship, after having taken on board part only of her return cargo, was lost at Jamaica, while passing from port to port in that island, in order to complete it. It appeared, however, by several letters from merchants and planters, which plaintiff produced at the trial, that, although only part of the cargo was shipped at the time of the loss, yet contracts had previously been made for the whole of the residue, and upon this evidence he recovered for the whole freight.¹

Under a policy on freight and passage money for a homeward voyage "at and from Madras and all ports and places in the East Indies to the United Kingdom," the shipowner, in pursuance of an agreement with the government of Madras to carry goods for them on board his ship at certain freight, and also to fit her up with an extra deck, and make other alterations for the purpose of accommodating 200 invalids, whom the company engaged to send home in his ship at a fixed rate of passage money, had commenced making the proposed alterations, had actually received on board the greater part of the cargo, and had shipped water for 100 invalids, when, before the alterations were completed, or any of the invalids embarked, the ship was driven from her moorings and totally disabled. The Court held him entitled to recover the whole freight for all the goods that were to be shipped under the contract, and passage money for as many invalids as his ship would have carried.²

Truscott v.
Christie.

The later decisions show that the freight for the whole cargo is equally due, though no part has been shipped, if the whole has been purchased or contracted for at the time of the loss, and the ship were then in a condition to receive it on board.

Ultimate
development
of the rule.

Thus, where freight was insured on a homeward voyage

Flint v.
Flemyng.

¹ Parke v. Hebson, cited in 2 B. & B. 326, 329.

² Truscott v. Christie, 2 B. & B. 320.

“at and from Madras to London,” and the day after the ship had finished discharging her outward cargo at Madras she was totally lost by the perils of the sea, and no part of the homeward cargo was then shipped, but the captain had purchased for the ship a quantity of red wood to be laden on board, and a mercantile house at Madras had also engaged to ship a quantity of saltpetre, the Court held that the plaintiff was entitled to his full freight for the red wood and saltpetre.¹

Devaux v.
J'Anson.

An insurance was effected on the freight of a French ship on a return voyage “from Calcutta or any port or place on the Coromandel coast to Bourbon.” The ship, after sailing on her outward voyage, arrived at Coringa, a small English settlement on the Coromandel coast, where, owing to sea damage sustained on the voyage, it was necessary to take her into a dry dock for repairs. During the course of these repairs the supercargo purchased, on behalf of the owners, a full return cargo to Bourbon, which was warehoused at a place seven miles from Coringa, and was there lying ready to be conveyed aboard the ship on the day when she was reported ready for sea. On that day she was still in dock, but on being floated into the river would have been in full readiness to receive her cargo; by some mismanagement, however, in attempting to get her out of the dock, the ship was so much damaged that she was obliged to be broken up and sold. Under these circumstances the Court of Common Pleas held, that as the whole of the return cargo was purchased and ready to be put on board at the time of the ship's loss, and as that loss was occasioned by a peril within the policy, the plaintiffs were entitled to recover the full freight on the whole of the return cargo.²

As to the cargo being seven miles off, the Court considered it impracticable to lay down any precise rule as to the distance

¹ Flint v. Flemyng, 1 B. & Ad. 45, see post, p. 437. This position was not disputed, but also not decided in relation to the facts of Warre v.

Miller, 4 B. & C. 538.

² Devaux v. J'Anson, 5 Bing. N.C. 519.

within which the cargo must be from the ship at the time of the loss, whether close to it upon the quay or at a more considerable distance. "All that it seems necessary to determine with regard to the cargo, being, that it must have become the property of the [freighters]¹ by a contract made with a view to its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrives at the place of deposit."²

As to the contract under which the cargo is to be shipped on board, all that is required is, that it be valid and binding at law. But then this is essential and indispensable. The contract to ship.

Thus under a policy on freight, the ship had sailed from Sierra Leone with the intention of taking in a complete cargo of orchella weed from the Cape de Verd Islands, and was lost when only 150 bags had been shipped on board, and it did not appear that any more orchella weed was then ready to be loaded,³ or that any binding contract, whether verbal or otherwise, had been made for supplying it; Lord Ellenborough held, that the plaintiff was only entitled to the freight on the 150 bags actually shipped.⁴ So in the case of *Flint v. Flemyng*, in addition to the red wood which the captain had purchased, and the saltpetre, which the mercantile house had formally contracted to put on board, it was proved that a partner in that house had also engaged verbally to ship on board ninety tons of light goods. With regard to these ninety tons of light goods, the Court ordered a new trial, because the question was not distinctly submitted to the jury, whether there was any binding contract for shipping these goods.⁵ Patrick v. Eames.
Flint v. Flemyng.

If the bulk of the homeward cargo be not ready, though

¹ The words are "parties insured," viz., the shipowners in that case.

² 5 Bing. N. C. 539.

³ Though it was proved that persons were actually engaged in the different

islands in picking and preparing it. See the Report.

⁴ *Patrick v. Eames*, 3 Camp. 441.

⁵ *Flint v. Flemyng*, 1 B. & Ad. 45.

Rule where
readiness of
cargo and
ship is but
partial.

there is a valid contract to ship, and the ship be not ready inasmuch as the bulk of her outward cargo is still on board, the policy nevertheless attaches on the freight of such goods as have been actually loaded on board for the homeward voyage prior to her loss. In such a case if it be a valued policy, the assured shall recover only such a proportion of the whole sum insured, as the goods actually shipped bear to a full cargo, or to those intended to have been shipped.

Forbes v.
Aspinall.

With a policy on freight valued at 6500*l*.¹ for a homeward voyage, "at and from any port or ports in Hayti to Liverpool, or the ship's port of discharge in the United Kingdom," there was no charter-party, and the ship, which was engaged as a general or seeking ship, sailed from Liverpool to Hayti with a cargo intended for barter. At the port of Jacmel, in Hayti, she bartered away part of her outward cargo, and took in exchange fifty-five bales of cotton as part of her homeward lading; and she was proceeding thence to Aux Cayes, also in Hayti, to barter away the rest of her outward cargo and complete her lading home, when she was totally lost by the perils of the sea with the great bulk of her outward cargo still on board. It did not appear that any goods were ready, or had been contracted for, at Aux Cayes, to be shipped at the time of the loss; and the Court held the plaintiffs entitled to recover only for the loss of freight in the proportion of the fifty-five bales actually on board to what would have been a full cargo.²

The grounds upon which this decision proceeds are:—1. That, as in this case there was no entire contract for freight under a charter-party for the whole voyage out and home, the right to the whole freight did not accrue by the inception of the outward voyage; 2. That none of the cargo, in respect of which freight was claimed, beyond that which was taken on board, was ever ready for the ship; 3. That even had it

¹ The case of *Forbes v. Cowie*, 1 Camp. 520, was the same case with *Forbes v. Aspinall*, only on an open instead of a valued policy.

² *Forbes v. Aspinall*, 13 East, 323; *Forbes v. Cowie*, 1 Camp. 520; *S. P.*, *Tobin v. Harford*, 13 C. B., N. S. 791.

been so, the ship at the time of the loss was not in a state of readiness to receive the cargo. "The homeward cargo, which was the subject of insurance, was to be obtained by barter of the outward cargo; and at the time of the loss the bulk of the outward cargo had not been disposed of: it was impossible, therefore, at that time, that the homeward cargo could be put on board."¹

This last ground of decision was afterwards adopted by Lord Lyndhurst in determining a question which, though indirectly involved, was not explicitly raised in *Forbes v. Aspinall*, viz., whether the risk under a freight policy "at and from" an out-port for the homeward voyage had attached or not.

A policy was effected on freight for a homeward voyage "at and from Algoa Bay to London." The ship, after she had arrived at Algoa Bay, and had unloaded there all the outward cargo destined for that place that she safely could, was just about commencing to load on board her homeward cargo, which was there lying ready for her, when she was lost by a hurricane. Lord Lyndhurst told the jury that if, under these circumstances, the ship was in a condition to begin to take in her homeward cargo at the time of the loss, the plaintiff was entitled to recover for the whole freight, and the jury found accordingly.²

In the cases hitherto considered the freight insured was freight strictly and properly so called, the reward, that is, to be earned for the shipowner by the carriage of the merchant's goods. Unless, therefore, some goods were in fact shipped on board, or only prevented from being shipped by the intervention of the perils insured against, the shipowner's inchoate right to freight, as the price of the carriage of such goods, could obviously not have accrued.

Freight in the second of the two senses already mentioned

¹ *Per Wilde, Serjt., arguendo; Devaux v. J'Anson*, 5 Bing. N. C. 519, 528.

² *Williamson v. Innes*, cited in 8 Bing. 81, note; see also *Warre v. Miller*, 4 B. & Cr. 538.

Chartered
hire of the
ship.

is a fixed sum stipulated to be paid to the shipowner in the terms of a charter-party for the use of his ship, or of part of it, on the voyage therein described. The question now to be considered is, what are those circumstances that determine the commencement of the risk on this species of freight, which we have called the chartered hire of the ship.

Under such a contract, it is obvious, the ship may earn freight, in this sense of the term, though no goods may ever be put, or be ready or engaged to be put, on board. Consequently, if there have been an inception of performance under the charter-party, and such performance is interrupted and the completion of the contract is prevented by the perils insured against, the assured is entitled to recover the whole amount insured upon freight, quite irrespective of the question whether, at the time of loss, she had taken any goods on board for the voyage insured, or whether any were contracted to be shipped.

Thompson v.
Taylor.

A shipowner who insured half the freight of his ship on a voyage "at and from London to Teneriffe, and at and from thence to the Bay of Honduras," had chartered the ship to sail from London to Teneriffe, where she was to take wine on board and carry it out to the West Indies; freight for the whole voyage to be paid at the rate of 35s. per pipe. The ship sailed from London on her voyage under the charter-party; and before her arrival at Teneriffe, and, of course, before any of the wine was taken on board, she was captured by the French. The Court held the plaintiff entitled to recover the whole amount of the sum insured on his freight.¹

Suppose upon the contract of charter-party and insurance in that case, the fact had been that the ship was destroyed by fire at London, the question then, and that a very nice one upon the facts, would have been whether there had been an inception of performance under the charter-party.² The charter-party being to proceed from London to Teneriffe, and there load, although the policy was "at and from

¹ Thompson v. Taylor, 6 T. R. 478. v. Fleming, L. R., 5 Q. B. 59, 70, 71, cited post, p. 442.

² See per Blackburn, J., in Barber

London," there could have been no inception of performance under such a charter-party, if she had been destroyed while on the gridiron, or in a graving dock for repairs, notwithstanding such repairs were being done with a view to the chartered voyage. This would have been so, although she was then at her moorings, if her sails were still not bent to the yards.¹ For the question under consideration arises on a policy upon freight. If it were a policy on the body of the ship, the question could receive but one answer from the moment of her being *at* London. But freight the subject of insurance being under and in virtue of a contract, the whole question is when, or under what circumstances, the title thereto first becomes inchoate. Negatively, it may be answered, that such title at the *terminus a quo* of the charter-party does not arise until the ship is in a fit condition to perform the contract. The contract of charter-party, however, may be such that the question of fit or unfit condition may not arise, the *terminus a quo* of the policy being in fact an intermediate port in respect of performance under the charter-party. This appears by the following case:—

A ship that was loaded and about to sail from Calcutta to Mauritius was chartered to "proceed on her present voyage to Mauritius, and having discharged her cargo there, to proceed to Akyab, and there load," &c., and a policy was then effected "on chartered freight valued at 1150*l.* at and from Mauritius to rice ports," &c. The vessel accordingly sailed from Calcutta with the cargo then on board, and at Mauritius, while she was discharging, but while there were still about two thirds of that cargo on board, she was driven from her moorings by a hurricane, and reduced to a wreck. It was held in an action on the policy that the assured was entitled to recover as for freight to arise under the second charter-party.²

The policy being *at* and *from* *Mauritius* attached at the

¹ *Tonge v. Watts*, 2 Str. 1251, Insurance Co. of Sydney, L. R., 5 ante, p. 433. C. P. 155 (Exch. Ch.).

² *Foley v. United Fire and Marine*

Foley v. United F. & M. Ins. Co. of Sydney.

moment of the vessel's arrival there. But for the purposes of an insurable interest which could have been covered by a policy suitably worded, there appears to have been an inchoate title to freight under the second charter-party, from the moment of the ship's proceeding from Calcutta under the first; for, performance of the first charter-party was so incorporated with the terms of the other as for all the purposes of a policy properly worded to become performance under the second. This is illustrated by the following cases:—

Barber v.
Fleming.

A vessel "now lying in the harbour of Bombay" was chartered for a voyage from Howland's Island to a port of discharge in Great Britain with a cargo of guano. A policy was effected "on freight, chartered or otherwise, valued at 3600*l.* at and from Bombay to Howland's Island, while there, and thence to ports of discharge in the United Kingdom, with liberty to sail to, touch and stay at any port or places whatsoever." She sailed in ballast from Bombay for Howland's Island intending to call at Auckland, in New Zealand, to complete her supply of provisions and water. But while making for Auckland she got ashore and was so injured as to be quite incapable of the voyage. It was held that an inchoate title to freight had accrued, and that the assured was entitled to recover on the policy.¹

"From the moment," says Cockburn, C. J.,² "that a vessel is chartered to go from port A. to port B., and at port B. to take a cargo and bring it home to England, or to take it to any port, which I will call port C., for freight, the shipowner having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the port at which the cargo is to be loaded, and

¹ Barber v. Fleming, L. R., 5 Q. B. 59.

² Barber v. Fleming, L. R., 5 Q. B. 67.

from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge."

In the same case Blackburn, J.,¹ says: "Upon the face of the policy there is a bargain between the assured and the underwriters by which, if during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay. We have, therefore, to see whether there was freight lost during the voyage, which involves the question whether this chartered freight had come into existence at the time the accident happened which caused the alleged loss; whether at that time the interest had commenced. When there is an insurance upon freight, so long as the matter remains merely contingent,—so long as the shipowners have only a good hope of getting freight, no freight is in existence; and if the ship is lost, there would be no loss of freight, inasmuch as the freight had never come into existence, and all that the shipowners have lost is the hope of earning the freight. But, on the other hand, when a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which, if afterwards destroyed by one of the perils insured against, is lost, and ought to be paid for by the underwriters."

By charter-party it was agreed that the *Sir William Eyre* should proceed to New Zealand with a cargo for owners' benefit, and from thence to Calcutta, and there load a cargo for Liverpool for the freighter. The owners of the ship effected a policy on 4,000*l.* homeward chartered freight from Calcutta to Liverpool, "lost or not lost, at and from Clyde to New Zealand, and for thirty days after arrival." After her arrival at New Zealand the vessel grounded, and received such damage by sea perils as to have become a constructive total loss. As soon as the owners knew the extent of the

Potter v.
Rankin.

¹ Barber v. Fleming, L. R., 5 Q. B. 70, 71.

damage, which was not till she got to Calcutta, they refused to repair, and sued the insurers for the amount of the homeward chartered freight, the damage having occurred before the expiration of that policy. It was held, in the Exchequer Chamber and by the House of Lords, that there was an insurable interest in this homeward freight from the moment that she sailed on the voyage from Clyde to New Zealand, which had been incorporated with the homeward charter-party, and that as the ship had been incapacitated for performing the voyage from Calcutta to Liverpool by sea perils, the right to recover under the policy had accrued.¹

*Horncastle v.
Suart.*

A shipowner insured the freight of his ship for a homeward voyage "at and from Dominica, and all or any other of the West Indian Islands (Jamaica and St. Domingo excepted), to London," having chartered the ship for a voyage from London to the Island of Dominica and back to London, on the terms of being paid half the net freight of the outward voyage, if it exceeded 1000*l.*, but if not, then 500*l.*; and, as to the homeward freight, the current rate for a full cargo, or, if the cargo should not be full, dead freight for the deficiency. The ship arrived safely at Dominica with her outward cargo, and there unloaded as much of it as she safely could before taking in some part of the homeward lading. A full cargo of West Indian produce had been procured by the charterer's agents at Dominica, and was ready to be loaded on board the ship there; but before any portion of it could be actually taken in, the ship was captured by the enemy. The Court held that, as the voyage had commenced under which the freight was to be earned, the assured was entitled to recover the whole amount of the insurance on the homeward freight.²

*Davidson v.
Willasey.*

Upon the same principle, where an insurance was effected on the homeward freight of a West Indian ship, chartered for a voyage out and home on the terms of taking in a full

¹ *Potter v. Rankin*, L. R., 6 H. of Lds. 83, 151.

² *Horncastle v. Suart*, 7 East, 400.

cargo of produce for the homeward voyage, and carrying it either to London or Liverpool at the current rate of freight ; and the ship after arriving at her out-port of discharge in the West Indies, was lost there, when she had taken on board only half her homeward cargo, the Court held that there had been at the time of loss, an inception of the entire voyage out and home, and that the assured was entitled to recover as for a total loss of the homeward freight.¹

A shipowner insured the outward freight by a West Indian ship under a charter-party from London to Madeira, and thence to Jamaica ; the freight or hire for the whole voyage being 135*l.*, to be paid at Madeira, on a true delivery of the whole of the London cargo there, in wine to be taken on board and carried on, with the rest, to Jamaica, free of freight, under the denomination of freight wine. The ship at Madeira had taken in part of her Jamaica cargo, but not the freight wine, when she was blown out of Funchal roads by a storm, and captured at sea by the French. The assured recovered the whole amount insured, for the reason that as soon as the ship broke ground from London on the voyage, an inchoate right to the whole freight attached, which was defeated only by the intervention of a peril insured against.²

Atty. v.
Lindo.

The Court were also of opinion that under this policy, considered with reference to the terms of the charter-party, the risk must be held as continuing till the ship, with the freight wine on board, arrived at Jamaica ; it being an insurance, not only that the shipowner should be in a condition to earn freight by receiving freight wine on board at Madeira, but also that the wine so received should, notwithstanding the perils insured against, be safely carried to Jamaica.³

By a charter-party at Monte Video, a vessel was to proceed to the Falkland Islands, and thence to Santa Cruz, in Patagonia, there to take in a cargo of guano, and to discharge it

Ellis v.
Lafone.

¹ Davidson v. Willasey, 1 M. & Sel. 236.

313.

³ Per Sir J. Mansfield, 1 B. & P.

² Atty v. Lindo, 1 B. & P. N. R. N. R. 241.

at a port in Europe; freight at 250% a month, pay for one month to be made when the vessel sailed from the Falkland Islands, the balance at the port of discharge. There was a safe delivery of cargo at the Falklands, and an advance of 250%, being one month's freight. She then loaded guano at Santa Cruz, and completed the cargo with hides at Monte Video, where a new charter-party in effect annulling the first was made, by which the vessel was to proceed to Havre direct with the cargo then on board, freight (at the same rate as by the first charter) to be paid at the port of discharge, after deducting 250% received on account of that charter-party. The vessel sailed, and went down at sea, a total loss.

In an action on a policy, "lost or not lost at and from Monte Video to Havre on 450% freight advanced," the Court held the plaintiffs entitled to recover the 250% as freight advanced, since that was not a separate sum paid in respect of the voyage to the Falkland Islands, but part of an entire sum payable for the whole voyage insured, which therefore remained at risk till the ship arrived in Havre, her port of discharge in Europe.¹

Care and skill in wording the policy.

Inadvertence in filling up the blank form of the policy not unfrequently defeats the intention manifested in the earlier clauses of it.

Thus where a ship had been chartered for a voyage from Liverpool to Lagos, and thence with a cargo to the United Kingdom, at a lump sum for the round voyage, a policy was effected on freight "at and from Lagos," "the insurance to commence on freight from the loading of the goods on board at as above." The ship had arrived at Lagos, and was lost before she had shipped any of her homeward cargo; but it was held that in consequence of the second of the two clauses cited, the first was so modified that the assured could not recover.²

¹ *Ellis v. Lafone* (in error), 8 Exch. R. 546; 22 L. J. (Exch.) 124.

² *Beckett v. West of England Ins. Co.*, 25 L. T., N. S. 739.

A policy of reinsurance on chartered freight was effected "lost or not lost, upon freight payable in respect to this present voyage to be performed by the vessel *Napier*, from Baker's Island to a port of discharge in the United Kingdom; the insurance on the freight beginning from the loading of the vessel." The vessel was wrecked whilst at Baker's Island after she had taken two thirds of her cargo on board; and the question was, what was the effect of the latter branch of this clause, "beginning from the loading," upon the former describing the insured voyage "from Baker's Island." The majority of the Court, Mellor and Lush, JJ., held that the loading intended was a complete loading, and that the policy would have attached upon this being completed, although before the vessel sailed from Baker's Island. Blackburn, J., was of the same opinion as to the loading intended being a complete loading, but he was of opinion that the latter part of the clause did not enlarge the effect of the former, and consequently that the policy would not attach until the vessel sailed on her voyage. By the opinion of the whole Court the assured could not recover.¹

If there has been no inception of performance under the contract, or if the contract which is being performed at the time of the loss is not that which is described in the policy, of course the policy never attaches. The contract being performed must be that in the policy.

Freight valued at 500% was insured on a voyage "at and from Demerara, Berbice, and any of the Windward and Leeward Islands, to London." By a verbal agreement with a Demerara house, the ship, then in that port, was to carry a cargo of colonial produce for them from Berbice to London, at the current rate of freight, and also take on some bricks and planks from Demerara to Berbice, on the same terms. The ship was lost while proceeding from Demerara to Berbice with the bricks and planks on board, in virtue of this Sellar v. M'Vicar.

¹ Jones v. Neptune Mar. Ins. Co., Wear Marine Ins. Co., 46 L. T., L. R., 7 Q. B. 702. So, Hopper v. N. S. 107.

verbal agreement. The plaintiffs contended that the whole was one entire voyage on which freight was to be earned; but the Court were clearly of opinion, that the voyage insured was a voyage at and from Demerara or Berbice to London, or from any of the Windward or Leeward Islands, according as the ship might happen to begin her voyage to London, and that no such voyage had ever been commenced at the time of the loss.¹

¹ *Sellar v. M'Vicar*, 1 B. & P. N. R. 23. See *Clapham v. Cologan*, 3 Camp. 382.

CHAPTER X.

DEVIATION AND CHANGE OF THE VOYAGE UNDER THE POLICY.

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In almost all voyages, as we have already seen, experience and usage have prescribed a certain course of navigation as the safest, directest, and most expeditious mode of proceeding from one terminus to the other. The course thus prescribed is the lawful course of the voyage insured. Being a matter of general mercantile notoriety, this course is presumed to have been contemplated by the parties to the policy at the time of entering into their contract; and is therefore considered as forming part of the policy quite as much as though it were in express terms therein set forth.

Of the general doctrine of deviation.¹

In every contract of insurance, by means of a voyage policy, the meaning of the parties is taken in law to be that the assured shall have the protection of the policy only so long as he strictly pursues this prescribed course of the voyage insured from beginning to end throughout with all safe, convenient, and practicable expedition.² It is only upon this condition, never expressed, but universally implied, that the underwriter agrees to indemnify the assured; any failure, therefore, to comply with it alters the nature of the risk

An implied condition of the policy.

¹ The subject of this chapter affects voyage policies only.

² 3 Kent, Com. 315.

which the underwriter had assumed, and from that moment frees him from liability for subsequent loss.¹

Deviation defined.

This tacit understanding not to depart from the lawful course of the voyage insured, is technically called an implied condition not to deviate; and a deviation, in the legal sense of that term, may be defined to be any unnecessary or unexcused departure from the usual course or general mode of proceeding towards the original *terminus ad quem* of the insured voyage, so that the risk is altered, although it be not aggravated, by such departure.²

Includes delay.

This implied condition extends as well to the time in which the voyage insured ought to be accomplished, as to the track or course of navigation by which it ought to be pursued. The understanding implied in the contract between the parties is not only that the ship, in sailing between the termini of the voyage insured, shall follow the course which custom has prescribed, but also that she shall commence and complete the voyage with that reasonable expedition which the insurer has a right to expect.³

Hence, any unreasonable and unexcused delay either in commencing or prosecuting the voyage insured, no less absolves the underwriter from his liability to subsequent loss than a local departure from the usual course of the navigation.⁴

Does it vary the risk?

It is not necessary to prove that the peril has been enhanced by the delay or deviation. The underwriter only undertakes to indemnify the assured upon the implied condition, that the risk shall remain precisely the same as it appears to be on the face of the policy interpreted by usage. Immediately that this risk is, by the act of the assured or

¹ Les lieux des risques une fois abandonnés par le déroutement volontaire ne se retrouvent point aux yeux de la loi; le contrat une fois dissous ne peut se renouveler que par le consentement respectif des parties; 2 Emerigon, c. xiii. s. 16, p. 18.

² 2 Emerigon, c. xiii. s. 16, p. 94; 2 Benecke, des Assecuranz, 234; 3 Kent, Com. 312. The language of

Emerigon is marked with all his usual terseness and perspicuity. "Le navire change de route lorsqu', au lieu de suivre la voie usitée, il en prend une différente, sans perdre toutefois de vue l'endroit de sa destination:"—loc. cit.

³ Hartley v. Buggin, 2 Park, Ins. 652.

⁴ Kent, Com. 315.

his agents, in any degree varied, although not aggravated, the underwriter's liability ceases by breach of the condition on which alone he engaged to become liable. The true proposition, therefore, is, that every voluntary and unnecessary departure from the prescribed course of the voyage, by which the risk is varied, is a deviation, whether the risk be thereby aggravated or not.¹

On the same principle it is not necessary, in order to discharge the underwriter, that the subsequent loss should be shown to be in any, even the remotest degree, connected with the prior deviation; the ship after the deviation may have returned in perfect safety to the proper course of the voyage, without having sustained the slightest injury in consequence of her departure from it; and yet on the ground that the risk passed through was thereby varied from the risk insured, the underwriter will be discharged from his liability for any loss subsequent to the deviation.²

The loss need not be connected with the deviation.

Deviation does not, however, like unseaworthiness, discharge the underwriter from liability on the policy, *ab initio*; he still remains liable for losses incurred prior to the deviation. This condition differs in this effect from that other relating to seaworthiness, only because this latter respects the state of the ship the instant before the commencement of the risk, and consequently is a condition precedent to the policy attaching. The implied condition not to deviate relates to the conduct of the ship in the course of the voyage, and cannot by relation be carried back, so as to exempt the underwriter from liabilities incurred prior to its being broken.³

Deviation does not avoid the policy *ab initio*.

There must be an actual deviation, in order to discharge the underwriter; a mere intention to deviate, never executed, is not sufficient.⁴

Intention to deviate is of no effect.

¹ *Hartley v. Buggin*, 3 Dougl. 39, Lord Mansfield's judgment.

v. Hopper, 26 L. J. (Q. B.) 18, 22.

² *Elliott v. Wilson*, 7 Brown's P. Cases, 459; *Davis v. Garrett*, 6 Bing. 716. See the principle expounded by Lord Campbell, C. J., in *Thompson*

³ See *Green v. Young*, 2 Salk. 444;

Hare v. Travis, 7 B. & Cr. 14.

⁴ *Kewley v. Ryan*, 2 H. Bl. 343; *Thellusson v. Fergusson*, 1 Dougl. 361.

The deviation must be voluntary.

Moreover, it must be a voluntary departure from the usual course of the voyage in order to be a deviation; yet if it take place through the gross ignorance of the captain, it is none the less a deviation.¹

There is no implied waiver of deviation.

A prior deviation is not impliedly waived, although known to the underwriter at the time he accepts the risk, in case the policy in the usual way so describe the voyage as that the deviation in question is a breach of the condition implied in such description.²

Distinguished from change of voyage.

The definition of what constitutes *deviation* seems to require that it should be distinguished from what is called *abandonment* or *change of voyage*. The great distinction between a deviation and a change or abandonment of the voyage, lies in this, that in the former the original voyage, as described in the policy, is not given up or lost sight of, while in the latter it is.

Distinction.

"A deviation," says Chancellor Kent, "is not a change of the voyage, but of the proper and usual course of performing it. The voyage insured is never lost sight of in cases of deviation, actual or intended. If, however, the original place of destination be abandoned, in order to go to another port of discharge, the voyage itself becomes changed, because one of the termini of the voyage is changed. The identity of the voyage is gone, and a new and distinct voyage is substituted."³

¹ *Phyn v. Royal Exch. Ass. Co.*, 7 T. R. 505.

² *Redman v. London*, 3 Camp. 503; *S. C.*, 5 Taunt. 462; 1 Marshall, R. 136.

The contrary has been ruled in the United States, *Coles v. Marine Ins. Co.*, 3 Washington's Circ. Court Rep. 159. Mr. Phillips says (vol. 1, no. 1041), in support of "the equitableness" of that decision, that the insurer ought not to be heard to set up his own fraud in defence. But is it

necessary for him to do so? By the admission of a deviation, in fact, the policy is gone, and with it the liability of the insurer. The only question then remaining, as the fact of deviation was known to both parties at the time of making the policy, is, whether the instrument as drawn expressed the intention of both parties.

³ In *New York Firem. Ins. Co. v. Laurence*, 14 Johnson's R. 46; 3 Kent, Com. 317.

For the sake of convenience and illustration, as it can be done without any great risk of confusion, we shall here consider this subject of change of voyage, which, though broadly distinguished in principle, so closely upon the facts resembles deviation, that one as against the other is often argued upon the same facts.

Of the general doctrine of change of voyage.

A change of voyage takes place when, either before or after sailing, the assured definitively abandons all thought of proceeding to the port of destination set down in the policy.

What it is.

The effect of this is to discharge the underwriter from all liability on the policy from the moment the purpose of so changing the voyage is definitively formed. Hence, if the purpose of changing the voyage be fixed before the commencement of the risk, the policy is void *ab initio*, and the risk never attaches; if it be not formed till after the ship has sailed, the underwriter is discharged from all liability for losses which may accrue subsequently to its having been formed, although such loss may take place while the ship is still on the track common both to the voyage insured and to that which is substituted for it.¹

Its effect.

An intention to deviate, on the other hand, may be defined to be a purpose to depart from the true course of the voyage, without giving up the design of ultimately proceeding to the *terminus ad quem*. However decisively such an intention

Distin-
guished.

¹ 2 Emerigon, c. xiii. ss. 11 and 14, pp. 82, 92. Both the sections here referred to must be consulted in order to discover that the French law is identical with ours on the present subject. In the former of these sections the learned author discusses what he calls "*le voyage rompu avant le départ*"; in the second "*le voyage changé*." See, also, 2 Benecke, des Assurances, 314-325.

In the United States the Court of

Errors, in a case of N. Y. Firemen's Ins. Co. v. Laurence, 14 Johns. 46, reversing the decision below, held that the voyage was changed from the moment the master had determined upon a new destination, although he had not entered upon the altered route when his ship was captured. 1 Phillips, no. 966, where the author offers reasons against the decision.

may be formed, the underwriter remains liable for all loss incurred prior to its being actually carried into effect; *i. e.*, as long as the vessel continues on the direct course of the voyage insured, and before she has reached the point of deviation.¹

Woolridge v.
Boydell.

A ship, insured "from Maryland to Cadiz," cleared out for Falmouth in this country, gave bonds to land her cargo in Great Britain, and sailed with the intention of making Falmouth her port of destination; but was captured while on the course common both to Falmouth and Cadiz. It was contended that this was a mere case of intended deviation. The Court said it was a change of voyage; for that on which the vessel sailed was different from the voyage insured; and they accordingly held the underwriter not liable for the loss, though it had taken place before the ship passed the dividing point.² Lord Mansfield thus distinguished the case from that of an intended deviation:—"In all cases of that sort the *terminus a quo* and *ad quem* are certain and the same; but in the present case the *terminus ad quem* has been altered, for there was no intention of going into Cadiz at all."

Thellusson v.
Fergusson.

On the other hand, when the master of a vessel insured for a voyage "from Guadaloupe to Havre," had, in pursuance of his instructions, formed the intention of sailing first to Brest, as the safest way, in time of war, of getting to Havre, which latter place still continued the port of the ship's ultimate destination; this was held to be a mere intention to deviate, leaving the underwriter liable for the loss of the ship before she had reached the dividing point at which the course to Brest diverges from that of Havre.³

Kewley v.
Ryan.

So, where a vessel insured from "Granada to Liverpool" took out clearances for Cork, at which place the master was instructed and intended to put in, though bound ultimately

¹ Woolridge v. Boydell, 1 Dougl. 16 a; Thellusson v. Fergusson, 1 Dougl. 361; Kewley v. Ryan, 2 H. Bl. 343.

² Woolridge v. Boydell, 1 Dougl. 16 a.

³ Thellusson v. Fergusson, 1 Dougl. 361.

for Liverpool, and the ship was lost before reaching the dividing point, the Court held the voyage continued the same, the design of putting into Cork being a mere intention to deviate, and the underwriter was liable for the loss.¹

Goods, warranted "free of average under 3 per cent., were insured from Liverpool to London," but the master had taken in goods for Southampton, and did afterwards put in there; the Court held this a deviation, which discharged the underwriters from subsequent, but not from prior, loss; and as the goods had sustained more than 3 per cent. damage before the ship diverged from the course of her voyage to London in order to go into Southampton, the assured recovered.²

Hare v.
Travis.

Where a ship sailed with an intention to deviate by putting into an intermediate port, but before she turned off for that purpose was overtaken by a storm and driven into that very port, this was held no deviation, and of no effect on the underwriter's liability.³

It is sometimes a matter of very nice discrimination, to draw the line between an intention to deviate, and an abandonment of the voyage. The test in all cases is, whether the *terminus ad quem*, specified in the policy, remains the ultimate place of intended destination; if it does, then the design, though formed before sailing, of putting into any other port or taking an intermediate voyage in the way to such ultimate place of destination, does not necessarily amount to a change of voyage.

Test of dis-
tinction.

In one case where the voyage insured was "from Heligoland to Memel," it appeared that the ship sailed with a preponderating purpose to proceed to Memel, but with orders to go into Gottenburg to learn whether it would be safer to proceed to Memel or to Anhalt, and the ship was afterwards captured in sailing from Heligoland to Gottenburg while on

Heselton v.
Allnutt.

¹ Kewley v. Ryan, 2 H. Bl. 343.

² Hare v. Travis, 7 B. & Cr. 14.

³ Kingston v. Phelps, cited 7 T. R.

165; so held also in the United States, Hobart v. Norton, 8 Pickering's Massachusetts Rep. 159.

the direct course both to Anhalt and to Memel ; Lord Ellenborough held, that there was only an intention to deviate to Gottenburg, and that the contingent purpose of going to Anhalt was not a change of voyage, and, consequently, that the underwriters were not discharged.¹

An unavoidable deviation, though it extend to the interposition of an intermediate voyage, does not discharge the underwriters, if there be no abandonment of the original voyage, and the ship be lost while prosecuting it.

Driscoll v.
Passmore.

A ship was insured for a round voyage "from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa, in ballast, and thence back to Lisbon with a cargo of wheat," and an insurance on the freight of the wheat by her "from Saffi to Lisbon" was effected on a representation that the ship, which was then at Madeira, was about to pursue her voyage to Saffi immediately. Instead, however, of doing this, the captain was forced by his crew, alarmed by reports of Moorish cruisers, to take the ship back from Madeira to Lisbon. On his arrival at Lisbon the charterers insisted on his taking the ship direct from that port to Saffi in ballast, which he accordingly did, loaded a cargo of wheat at Saffi, and was captured while sailing on his homeward passage from Saffi to Lisbon. In an action upon the freight policy, the Court was clearly of opinion that there had been no abandonment of the original adventure, and that as when taken she was sailing from Saffi to Lisbon, the voyage actually insured in the freight policy, the underwriters were not discharged.²

If there be no justifying cause for such intermediate voyage, and it is not allowed by usage, nor involved in the voyage contemplated by the parties as the principal object of the contract, this will be deemed an abandonment of the

¹ Heselton v. Allnutt, 1 M. & Sel.
46.

² Driscoll v. Passmore, 1 B. & P.
200.

original adventure, and the underwriter discharged from all loss taking place after the commencement of the intermediate voyage, whatever may be the intentions of the captain as to the *terminus ad quem* named in the policy.¹

How strictly this rule is enforced appears by the following case:—A ship insured “at and from the 20th October, 1783, from any ports in Newfoundland to Falmouth or her port or ports of discharge in England,” did, on the 1st of October, sail from her port in Newfoundland to fish on the banks; there she continued fishing till the 7th, and on that day sailed from the banks to England; she was, on the 20th of October, sailing on a course common both to a voyage from the banks to England, and from Newfoundland to England, and so continued until and at the time of the loss for which the action was brought. The Court held, that as the voyage insured was from Newfoundland to England direct, and that on which the ship sailed was from Newfoundland to the banks, and then to England, the ship had never sailed on the voyage insured, and the policy had never attached.²

Way v.
Modigliani.

Whether, in point of fact, the intention to abandon the original destination of the voyage has been definitely adopted at the time of the loss,³ is a question of evidence, and the fact of sailing does not necessarily enter into the determination of it. The conduct of the assured in respect of the ship while she is still in port may be such as, in case of a policy “at and from,” will alter his relations with the underwriter entirely. “When a person,” says Lord Eldon, “is insured

¹ Bottomley v. Bovill, 5 B. & Cr. 210; see also Hamilton v. Shedden, 3 M. & W. 49.

² Way v. Modigliani, 2 T. R. 30. Mr. Phillips (1 Phillips, no. 992) doubts this decision on the same ground as Benecke (Des Assurances, vol. ii. 331), viz., that the *terminus a quo* of the risk was the 20th of October, before which day the vessel was

“on the specified voyage:” but was she so? She was on the same *iter*, but not on the same *viaggiu*; see 1 Phillips, no. 992.

³ For a good illustration of this, see the case of Hall v. Brown, 2 Dow’s Parl. Cases, 367, a case which stands too much on its own particular circumstances to be of any value except as an illustration.

‘at and from,’ a port, the probable continuance of the ship in that port is in contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run a different risk, if such change of intention is not to affect the contract.”¹

Tasker v.
Cunningham.

The case alluded to was this: A British ship arriving in Cadiz whilst the French army were in possession of the salt pans round that city, so that no salt could be procured, the agents there wrote to the owners in this country, that under the circumstances they had resolved, with the advice and concurrence of the captain, to despatch the ship to Liverpool to load with salt for Newfoundland. The owners, on receiving this communication, insured the ship “at and from Cadiz, to her port or ports of discharge in St. George’s Channel, including Clyde.” Much time having been spent in discharging her cargo of fish at Cadiz, the agents, thinking that the ship would arrive too late at Newfoundland, if sent first to Liverpool for salt, changed their plans, and resolved, after consulting with the master, to load the ship with what salt they could procure at Cadiz, and despatch her direct for Newfoundland. They again wrote to the owners of this proposed alteration, and about a week after the date of this last letter the ship, while still in the bay at Cadiz, and before she had entirely discharged her cargo of fish, or taken any steps whatsoever towards commencing the direct voyage from Cadiz to Newfoundland, was taken by the French, and burnt where she lay.

Upon this state of facts, the Scotch Courts three times decided that the ship, when so destroyed, was still under the protection of the policy; but the House of Lords finally reversed their decision, on the ground that a fixed determination had been formed to abandon the voyage insured before the loss took place.²

¹ 1 Bligh, 100.

² Tasker v. Cunningham, 1 Bligh’s Parl. C. 87.

Lord Eldon, in the course of his judgment, said, "It appears throughout the correspondence that the captain and the agents had taken upon themselves to direct and alter the destination of the ship, with the acquiescence, at least, of the owners."—"Undoubtedly a mere meditated change does not affect a policy; but circumstances are to be taken as evidence of a determination; and what better evidence can we have than that those who were authorized had determined to change the voyage? In my opinion, the voyage was abandoned, and I have the highest authority in Westminster Hall to confirm that opinion."¹

The evidence in the case.

From the preceding authorities, then, it is clear that if the assured, either before or after the ship sails, have determined to abandon the original port of destination, that discharges the underwriter from all loss happening after such determination is finally formed, though the loss occur before the ship quits the track of the original voyage, or under a policy "*at and from*," before she sails from the port where the risk was made to commence.

Result.

It seems also clear on principle, though never expressly so decided in this country, that abandonment of the voyage has no relation back, so as to discharge the underwriter from liability for loss incurred prior to the formation of the definitive purpose. It is only where this purpose of changing the voyage has been fixed before the commencement of the risk, that it can avoid the policy *ab initio*.²

Abandonment is not retrospective in effect.

The mere fact of taking in goods, and clearing out for a different port from that named in the policy as the *terminus ad quem*, does not *per se* amount to a change of voyage; for it is possible that this may have been done with the design

What is not abandonment.

¹ Tasker v. Cunningham, 1 Bligh's of M. Estrangin, in his learned notes on Pothier, in Appendix, p. 471.

² See upon this point the remarks

of putting into such port on the way to the original terminus, and with a purpose of ultimately carrying out the original adventure. In that case it would be a mere intention to deviate, not a change of voyage; and the assured would still be liable for all loss incurred before passing the dividing point.¹ So, *à fortiori*, it is no change of voyage for a ship insured to two or more specified ports of discharge to take in goods, and clear out for only one of them.²

Shortening
the voyage.

With regard to shortening the voyage, a ship, if insured to several successive ports, may terminate the voyage at one of the nearer of them without vitiating the policy; but it is otherwise if, being insured to a single port, she sail with a fixed purpose not to go beyond a port that is nearer, and not contemplated in the policy. Emerigon, in accordance with this view of the law, after stating it as a general principle, that a mere shortening of the voyage will not avoid the policy, adds, "provided that, at the outset, the voyage insured was not abandoned (*rompu*) by a change of destination."³

Middlewood
v. Blakes.

The case of *Middlewood v. Blakes*,⁴ which has given rise to diversity of opinion, is supposed to be in close relation with the present discussion. In that case it appeared that usage in respect of the voyage insured, from London to Jamaica, left a captain, on arriving at a certain point, the choice of three tracks (one to the north, and two to the south of St. Domingo), all equally leading to the *terminus ad quem*. In the particular case the captain, under orders from his owners (not communicated to the underwriter), took the northernmost track, intending to touch at Cape Nicola Mole, a port in that track, yet out of the direct course from London to Jamaica; but while still pursuing the direct course to

¹ *Henkle v. Royal Exch. Ass. Co.*, 1 Ves. 317; *Planché v. Fletcher*, 1 Dougl. 251; *Kewley v. Ryan*, 2 H. Bl. 343.

² *Marsden v. Reid*, 3 East, 571.

³ See 2 Emerigon, c. xiii. s. 11.

Voyage entièrement rompu avant le départ. See also the very lucid commentary of M. Estrangin on Pothier, Appendix, c. v. s. 3, p. 471.

⁴ *Middlewood v. Blakes*, 7 T. R. 162.

Jamaica, and before having turned off towards Cape Nicola Mole, the ship was lost by capture.

On these facts the finding of the jury, that the concealment of the intention to go to St. Domingo had vitiated the policy, was sustained by the majority of the Court *in banc*, viz., Lord Kenyon, C. J., Ashurst, and Grose, JJ., whereas Lawrence, J., thinking this ground untenable, upheld the verdict on the ground that there was a deviation not merely intended but entered upon at the point where the northern track turns aside from the tracks to the south. Judge Duer,¹ after a learned discussion of the case, adopts the opinion of the majority of the Court, that "the effect of the concealment was to vitiate the policy," because it exposed the underwriter to a loss from a risk which he never meant to assume; he likewise thinks that the policy was void in its origin, because the master was bound by the orders of his owner to follow a voyage not described in it.²

We resume the subject of Deviation, and proceed to examine in detail the various decided cases by which the doctrine has been illustrated in English jurisprudence; and in doing so, we will confine our attention, in the first place, to those instances of deviation depending entirely on the fact of a local divergence from the direct course of the voyage, and not in any degree on the construction of the clauses giving liberty "to touch, stay, or trade."

Cases of deviation irrespective of the clause "to touch and stay."

In the absence of any usage or stipulation to the contrary,

¹ 2 Duer, 491-498.

² When was the intention formed to send this ship to Cape Nicola Mole? If after the policy was effected, then I submit it was an intention to deviate, carried into effect probably at the dividing point of the three routes: it was not a substitution of a new voyage, because Jamaica was preserved as the *terminus ad quem*; *Kewley v. Ryan*, 2 H. Bl. 343. If this intention had been definitely

formed at the time of effecting the policy—and I infer this to have been so, for I gather that she was *then* under charter-party to Cape Nicola Mole: in that case, I submit, the voyage never was described in the policy; the policy consequently never attached, and to call the absence of any mention of Cape Nicola Mole a concealment, seems under these circumstances to be a misuse of language.

Deviation in
the absence
of usage.

the contract in the policy is held to be, that the ship should proceed from one terminus of the voyage insured to the other, in a direct course, with all due expedition, and without touching at any interjacent port, or pursuing any intermediate adventure. Anything that she does to the contrary of this, unjustified by any of the emergent causes that shall be considered hereafter, or without leave expressly given in the policy, however trifling in extent or duration, is a fatal deviation, although the ship afterwards return to her proper course nothing damaged in consequence of this departure from it.¹

Where there
is a usage.

Where, however, by the usage of trade, it is customary, in the course of the voyage insured, to stop at interjacent ports, though out of the direct line, it is no deviation to stop there, though leave for that purpose is not expressly reserved; for upon the principles already developed, such stopping is deemed to be in the regular course of the voyage insured, and therefore to have been contemplated by the parties to the policy. But for this purpose the usage must be precise, clear, and established. Thus, to put an instance that did exist, when all ships sailing through the Sound stopped at Elsinore to pay the Sound dues, it was no deviation, though liberty to stop there was not reserved in the policy.²

But a stoppage at the Isle of Man, by a ship insured from Liverpool to the West Indies, was held not to be justified by proof that ships on that voyage had occasionally, but not customarily, stopped there before.³ So, in the United States two instances of stopping at an intermediate port, not named in the policy, by other ships engaged in the same trade, was held inadequate to prove a usage or justify a departure from the direct course.⁴

¹ Fox v. Black, 2 Park, Ins. 620; Townson v. Guyon, *ibid.*; Clason v. Simmonds, 6 T. R. 533, note; 3 Kent, Com. 312.

² Cormack v. Gladstone, 11 East, 347.

³ Salisbury v. Townson, Millar, Ins. 418.

⁴ Martin v. Delaware Ins. Co., 2 Washington's R. 254; Condy's Marshall, 186, note.

On the same ground of usage, in the East India and Newfoundland trades, it has repeatedly been held to be no deviation to engage in intermediate voyages, although no liberty be given in the policy so to do.¹ In fact, where the termini only of the voyage insured are indicated by the policy, and the parties to the contract have done nothing else towards indicating its course, the sole guide in determining what that course should be, is mercantile usage; and nothing can be considered a deviation which follows only the course that usage has sanctioned.

Where, however, the policy itself, besides indicating the termini of the voyage, contains any directions as to the course which the ship shall take in sailing between them, such directions must be followed with the most scrupulous and literal exactness, and the slightest failure to comply with them will amount to a fatal deviation.

Unless the policy expressly exclude or be inconsistent with the usage.

Hence, where liberty is given in the policy to touch at any one specified intermediate port, it will be a deviation to put into any other than that named in the policy, though calling at such other port be sanctioned by usage apart from the policy, and neither the risk nor premium would have been increased had such port been substituted for that named in the clause. *Expressio unius est exclusio alterius*.

It seems to have been usual for vessels sailing from Carron for Hull, in going down the Firth of Forth, to touch at different places for the purpose of taking in and delivering goods, particularly at Borrowstounness, Leith, and Morrison's Haven. A merchant, desirous of insuring goods from Carron to Hull, directed his broker to effect an insurance with liberty in the policy "to call as usual" (which would have enabled the ship to touch at all or any of the three places

Elliott v. Wilson.

¹ As to the East Indian trade, see *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Dougl. 419; 1 Park, Ins. 104; 1 Marshall, Ins. 273; *Farquharson v. Hunter*, 1 Park, Ins.

105; 1 Marshall, Ins. 274. As to the Newfoundland trade, see *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, *ibid.* 505, note.

above mentioned); instead of this the broker, contrary to the directions of the merchant, and without his knowledge, insured from "Carron to Hull, with liberty to call at Leith." The premium was the same as though the general liberty to call as usual had been inserted in the policy.

The ship on her voyage did not call at Leith but put into Morrison's Haven, and afterwards without damage got safe again into the direct course of the voyage from Carron to Hull, and had been proceeding on such course for about a day, when she was overtaken by a storm and wrecked on the coast of Northumberland, with a total loss of the cargo.

The Scotch Courts, upon this state of facts, decreed that the underwriters should pay the loss; but the House of Lords reversed their judgment, on the ground that putting into Morrison's Haven, under a policy which contained no liberty so to do, but, on the contrary, gave express permission to put into another named port, was a deviation discharging the underwriters from all further liability.¹

The geographical order of "ports of discharge."

Where a ship is insured on a voyage to "ports of discharge," which are not specifically named in the policy, the general principle is, that the ship must visit such ports in the geographical order of their distance from the *terminus a quo*, or port of departure.

Clason v. Simmonds.

Thus, where a ship, insured on a voyage "from London to her ports of discharge within the Straits (of Gibraltar) as high as Messina," sailed on her voyage, with a freight for Marseilles, but with instructions to go also to Genoa, Leghorn, and Naples; and on arriving off Marseilles, her first port of discharge in geographical order, as she was prevented by contrary winds from putting in there, she proceeded first to Genoa and then to Leghorn, from which latter place she was making her way back to Marseilles, when she was captured: a special jury found this sailing back to Marseilles

¹ Elliott v. Wilson, 7 Brown's P. C. 459.

to be a deviation, which determined the policy from the moment of her leaving Leghorn.¹

If, however, the several successive ports of discharge are specifically named in the policy, then, upon the principle already stated,² it will be a deviation if the ship does not visit such ports in the precise order in which their names occur in the policy, whether that be the geographical order or not, unless, indeed, long and uniform usage, not manifestly excluded by the tenor of the policy, have established a different course.

A ship insured "at and from Fisherrow to Gottenburg, and back to Leith and Cockenzie," was on her homeward passage with goods on board both for Leith and Cockenzie. This latter port lies nearer to Gottenburg than Leith, and is about a mile and a half out of the direct course between the two; but there appeared to be no settled course of trade as to the order of calling at the two places on such a voyage as this. The ship first put into Cockenzie, and in coming out was stranded and lost. Upon these facts, the Court held that the ship was guilty of a deviation by putting first into Cockenzie, and the underwriter was discharged from his liability.³

It is not, however, necessary that a ship thus insured to several successive named ports of discharge should sail to all the ports so named. She may omit any or sail only to one; the sole limitation is, that if she visits more than one, she must take them in the order in which their names occur in the policy, unless there be a usage not excluded by the policy.

Thus, where a ship was insured "from Liverpool to Palermo, Messina, and Naples," Lord Ellenborough held the true construction of the insurance to be that the assured

When the policy determines the order of ports named.

Beatson v. Haworth.

Marsden v. Reid.

¹ *Clason v. Simmonds*, 6 T. R. 533, in notis; see per Sir Vicary Gibbs, *Andrews v. Mellish*, in error, 5 Taunt. 496, 502.

² Ante, p. 463.

³ *Beatson v. Haworth*, 6 T. R. 531; see also *Marsden v. Reid*, 3 East, 571, 577.

might drop any of the places named, but that if he went to more than one he must take them in the order named in the policy.¹

Summary and rule.

As a general rule, therefore, where there are several ports of discharge, the ship must take them either in the order in which they are named in the policy, or, if not named, then in the geographical order of their distance from the port of departure. But if long and uniform usage have established a different order, there can be little doubt that the other may be disregarded and this observed. It has even been intimated, though this is doubtful, that the order fixed by usage overrules that which is specified in the policy.²

To revisit is to deviate, unless justified by the policy or usage.

Generally speaking, it will be a deviation, after having once touched at one of several ports, to revisit it, or to sail backwards and forwards from one to the other; unless express liberty for that purpose be inserted in the policy;³ or unless it appear by the terms of the policy, that the purposes of the voyage as described necessarily involve such a liberty.⁴ As for instance, in the United States, a ship insured on a West India voyage to any one of the islands "and a market," was held to be justified in seeking a market at the different islands, without regard to their geographical order, and even in touching at the same port once and again, if it be with the *bonâ fide* intention of finding a market.⁵

From some one named *terminus a quo* and "other port or ports," not named.

Where a ship is insured "at and from" some one named port of departure and "other port or ports" to a fixed terminus, it depends entirely on the language of the clause and

¹ *Marsden v. Reid*, 3 East, 571. Same rule in the United States; see *Kane v. Columbian Ins. Co.*, 2 Johnson's R. 264; and see other cases illustrating the same point, 1 Phillips, Ins. no. 1010.

² *Beatson v. Haworth*, 6 T. R. 531; *Gairdner v. Senhouse*, 3 Taunt. 16.

³ *Gairdner v. Senhouse*, 3 Taunt. 16.

⁴ *Mellish v. Andrews*, 2 M. & Sel. 26; *S. C.*, 5 Taunt. 496, in error.

⁵ *Deblois v. Ocean Ins. Co.*, 16 Pickering's R. 303; see 1 Phillips, Ins. no. 1014.

the true construction of the policy whether it be a deviation for the ship to depart from the direct course between the first-named port of departure and the *terminus ad quem*, for a purpose connected with the main object of the voyage insured.

Thus, a ship insured "at and from Martinique and all or any of the other West India Islands to London," sailed to take in her cargo at St. Domingo, a place very wide of the direct course of a voyage from Martinique to London; this was yet held to be no deviation; "For in order to make it so," said Sir J. Mansfield, "you must read the insurance to be, not at and from Martinique and all or any other of the West India Islands, but 'at and from Martinique and such of the West India Islands as lie between Martinique and London.'" ¹

Bragg v. Anderson.

So, it was held no deviation for a ship insured "at and from Pernambuco or any other port or ports in the Brazils to London," after touching at Pernambuco, and finding no cargo there, to seek it at St. Salvador, another port in the Brazils 500 miles to the south of Pernambuco, and consequently so far in the opposite direction from that to London. Gibbs, C. J., said that if the insurance had been at and from Pernambuco or any other port in the Brazils, there might have been something in the objection, as it might then have been contended that, by electing Pernambuco as the port of loading, the assured could not go to another without a deviation; but that the alternative being, any other port or ports, there must have been an intention of sending her to more than one. ²

Lambert v. Liddard.

A ship was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom." The ship sailed from Liverpool for the coast of China, discharged part of her outward cargo at the Chinese port of Tonghoo,

Ashley v. Pratt.

¹ *Bragg v. Anderson*, 4 Taunt. 229.

² *Lambert v. Liddard*, 5 Taunt. 480; 1 Marshall's R. 149.

and proceeded to Manilla, where she discharged the residue. At Manilla, finding freights low, the captain took on board only a tenth part of a cargo and sailed back for Tonghoo, with the intention of there completing his homeward cargo and sailing thence direct to England, but on this passage the ship was lost. Tonghoo is quite out of the direct course from Manilla to England. The Court of Exchequer, notwithstanding, held this to be no deviation, for the words, "from thence" in the policy, applied not to Manilla only, but to "ports or places in China and Manilla, all or any."¹

Port and
ports—mean-
ing of.

It may become a question, under a policy to or from "port A. and a port or ports in B.," of considerable nicety, whether a particular place be a port within the meaning of the policy, so as to excuse what would otherwise be a deviation. First, is it a place within the country or province of B.? Secondly, is it such a place as would answer the designation *port*? We have seen that where the character and formation are such as would not be chosen for convenience, yet the effect of use and wont may justify the application of this term to an anchorage in an open roadstead.²

In one case where the alleged port was a roadstead or bay formed by headlands, and open to the east and north-east, without any other artificial formation than a jetty or pier attached to a slaughter-house, and vessels loading there were obliged to lie off in the roadstead a quarter of a mile from the jetty, and to load by means of craft,—this place, although frequented only by coasters trading to Buenos Ayres, and not at all by vessels loading for Europe, and although it was unknown to underwriters as a place of loading, was nevertheless held to be a port within the meaning of the policy.³

As in this last case the vessel was obliged to sail back to

¹ *Ashley v. Pratt*, 16 M. & W. 471; affirmed, in error, 1 Exch. 257; S. C., 17 L. J. (Exch.) 135.

² See also ante, p. 410.

³ *Harrower v. Hutchinson*, L. R., 4 Q. B. 523; in error, 5 Q. B. 584, 589.

Buenos Ayres to complete her cargo and obtain her clearances, it was argued that such sailing back was evidently not contemplated by a policy "from a port or ports of loading to a port or ports of call and discharge in the United Kingdom," and consequently was a deviation; but the Court held that the language of the policy permitted the ship to go from port to port and back to the same port until she had completed her cargo.¹

Everything in these cases depends on the meaning of the parties, so far as it can be ascertained from the terms of the policy, explained where doubtful by extrinsic evidence of usage.

Thus, it was held a deviation for a ship insured "at and from her port of loading in North America to Liverpool," after loading partly in one creek of a bay, to go afterwards eight miles off, to another creek of the same bay, to take in the rest. The terms of the policy showed that the underwriter did not mean to run the risk of loading the ship at two such distant places, and there was no evidence to show that the two places were considered by the mercantile world as forming parts of the same port.² If, indeed, the ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay, a mile or two off, that would not be a deviation, for there the ship would be all the time at one port or place; but it is a deviation if she removes to a different town or different place of habitation, which might itself be a port of loading.³

Brown v. Tayleur.

We next come to cases of deviation decided on the construction of those special clauses in the policy, by which liberty is given to the ship "to call," or "to touch," or "to touch and stay," or "to touch, stay, and trade," either at

Deviation under the clause "to touch and stay."

¹ *Harrower v. Hutchinson*, L. R., 4 Q. B. 523; in error, 5 Q. B. 584, 589.

² *Brown v. Tayleur*, 4 A. & E. 241.

³ *Per Patteson, J.*, *ibid* 249.

certain specified ports, or "at all ports whatsoever, for all purposes whatsoever," &c.

These cases are divisible into two classes.

Classes under which the cases range themselves.

1st. Those in which the question is, Whether the ship was justified, under the policy, in originally putting into the port at all:—and this question mainly turns upon the two following points,—(a.) Was the port one which, on the true construction of the policy, was within the course of the voyage as contemplated by the parties?—(b.) If so, was the purpose for which it was visited connected with and in furtherance of the main scope and object of the adventure?

2ndly. Supposing the ship to have been thus justified in originally visiting the port, as nothing which she does during the period of her lawful stay there, though foreign to the purposes of the adventure, and not specifically permitted by the policy, will be held to discharge the underwriter, unless it substantially varies the risk, the only question is, whether the trading, &c., at such port, has, in fact, varied the risk originally assumed by the underwriter.

A principle now abandoned.

Formerly, it appears to have been supposed that a great deal turned on the exact words of the clause, without reference to the real scope and purpose of the adventure, as discoverable from the whole language of the policy. Thus, a liberty "to touch" was supposed to have a different meaning from a liberty "to touch and stay;" and a ship, insured under a policy containing only the former clause, was considered to have no power thereby conferred on her of trading in the port at which she had touched, though such trading was obviously contemplated as part of the adventure.¹

Present rule.

But now the Courts, conformably with the good sense of the matter, hold that the licence conferred by these words must depend upon the real object which the parties had in view when they inserted the clause in the policy.

¹ *Urquhart v. Bernard*, 1 Taunt. 454, where Sir J. Mansfield said he

could not find the distinction anywhere defined.

Thus, in the case of a ship insured "at and from Madeira to Santos, with liberty to touch at the Cape de Verd Islands," where it appeared from communications made by the assured to the underwriter before effecting the policy, that the parties intended the ship to take in salt at one of the Cape de Verd Islands, she was held entitled to do so, under the mere liberty to touch there.¹

Urquhart v.
Bernard.

So, where a ship was insured from "Antigua to England," with an extensive "liberty to touch" at all or any of the West Indian Islands, Gibbs, C. J., held that as the main object of the voyage plainly appeared to be that the ship should go about from island to island seeking freight, the bare liberty "to touch" included a liberty to stay and take goods, and therefore that the ship's remaining two months at one of the islands, waiting for a cargo, was no deviation.²

Metcalfe v.
Parry.

In short, wherever it appears to have been clearly contemplated by the parties, or necessary to the purposes of the voyage insured, that the ship should trade where she has liberty merely to touch, her doing so will not be deemed a deviation.

We revert now to our classification of the cases illustrative of these principles of interpretation, and first proceed with those in which the question is, whether the ship was originally guilty of a deviation in visiting or staying at any given port.

What ports
may be
visited, and
for what
purposes.

The clause in question, whatever be the language, or how- ever extensive the terms, cannot convey a liberty of touching at any port out of what, on the true construction of the policy, appears to have been the understood course of the voyage, or of putting into any port within the limits of the voyage for purposes unconnected with the real objects of the adventure.³

Rule.

¹ Urquhart v. Bernard, 1 Taunt. 450.

² Metcalfe v. Parry, 4 Camp. 123.

³ This is but another instance under the general rule which re-

strains the effect of general terms to things *ejusdem generis*, or otherwise to matter of a tenor consistent with the context.

The true points of inquiry, then, are, 1st, Was the port at which the ship touched a port in the course of the voyage as understood by the parties? 2nd, Was the purpose, for which she so touched there, *bonâ fide* connected with the main object of the adventure?

Ports only in the direct course of the voyage.

1st. Unless, upon the true construction of the policy, it appears manifest that the parties had a different meaning, it may be taken as a general rule that a liberty to touch and stay, though conceived in very extensive terms, can only confer a power of visiting such ports as lie in the usual and direct course between the termini of the voyage insured. This inference is insurmountably strong if there be anything in the language of the policy expressly favouring such an interpretation.

Lavabre v. Wilson.

For instance, a ship was insured on an East India voyage, "out and home," "with liberty to touch in the outward or homeward voyage at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever;" and with a stipulation "that it should be lawful for the said ship in this voyage, to touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation." Lord Mansfield, in the course of the argument, intimated a clear opinion that the general words were qualified and restrained by the clause "in the outward and homeward-bound voyage," and "in this voyage," so as to mean "all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy."¹

Hogg v. Horner.

Upon the same principle, where a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever," Lord Kenyon was of opinion that the liberty given by this policy must be confined to ports to the northward of Lisbon, and in the direct course of a voyage thence to England; and he held accordingly, that the ship was guilty of deviation in

¹ Lavabre v. Wilson, 1 Dougl. 284.

sailing to Faro, a port to the southward of Lisbon, although she sailed there to complete her cargo—a purpose connected with the voyage insured.¹

So, where a ship was insured “at and from Africa to the Canaries, Madeira, and Lisbon, with liberty to touch, stay, and trade at all ports,” &c., “in the voyage,” it was held that, after having once moored at anchor for twenty-four hours in a port in Africa, so as to give an inception to the risk, she could not then proceed to the southward, but only northward, towards Europe, the object being only to protect deviations in the direct course of the voyage insured.²

Ranken v. Reeve.

So, where a ship was insured “at and from London to Trinidad and the Spanish main,” with liberty “to call at all or any of the West Indian Islands or Settlements,” Sir J. Mansfield expressed a clear and undoubted opinion that this liberty of calling must be confined to places taken in the direct and customary course between the termini of the voyage insured, and therefore could not be held to protect the ship, after having once sailed southward as far as Demerara, in then sailing up northward to Martinique and St. Thomas’s, unless, indeed, very satisfactory evidence were given that such was a customary course on such voyages as those insured in this policy.³

Gairdner v. Senhouse.

If, upon the true construction of the whole policy, it plainly appears that the parties could not have intended to give this limited effect to these clauses, they will be held to confer a power of visiting any ports within the scope of the policy, although they lie wide of the usual and direct course between the termini of the voyage, and even in a diametrically opposite direction; but then they must be visited for a purpose connected with the prosecution of the adventure contemplated by the policy.

The purpose of the voyage may require a different construction.

Thus, where a trading ship was insured on a homeward

Bragg v. Anderson.

¹ *Hogg v. Horner*, 2 Park, Ins. 627.
626; 1 Marshall, Ins. 184.

³ *Gairdner v. Senhouse*, 3 Taunt.

² *Ranken v. Reeve*, 2 Park, Ins. 16.

voyage "at and from Martinique, and all or any other of the West Indian Islands, to London," with liberty "in that voyage to touch and stay at any ports or places whatever," it was held to be no deviation under this policy for the ship after sailing from Martinique to put in for a cargo at one of the West Indian Islands (St. Domingo), which lay very wide of the direct course of the voyage from Martinique to London. Mansfield, C. J., said, "There is no getting over these words; instead of 'all' you must substitute the words 'some of the West India Islands, such as lie between Martinique and London.' That would make quite a new agreement."¹

*Metcalf v.
Parry.*

So, where a ship was insured "at and from Antigua to England, with liberty to touch at all or any of the West Indian Islands, Jamaica included;" and the ship, in order to complete her homeward cargo, put into St. Kitts, which lies wide of the direct course of the voyage from Antigua to England; it was contended that this was a deviation; but Gibbs, C. J., ruled decisively that it was not; for, by including Jamaica, which lies at least 500 miles wide of the direct course of the voyage from Antigua to England, it plainly appeared to be the meaning of the parties that the islands might be touched at without regard to their lying on or off such direct course, and that the ship was to go about, if necessary, from island to island, for the purpose of seeking freight.²

*Barclay v.
Stirling.*

Freight was insured on a voyage "from Jamaica to the United Kingdom;" and liberty was given in the policy "to call at all, any or every one of the foreign and British West Indian Islands, with leave to discharge, exchange, and take goods at any ports or places she may call at, or proceed to, without being deemed a deviation." The ship was driven

¹ *Bragg v. Anderson*, 4 Taunt. 229; see also *Lambert v. Liddard*, 5 Taunt. 480. In the case of *Violet v. Allnutt*, 3 Taunt. 419, the ship put into Penzance, where she had express liberty given her "to touch

for any purpose whatever," in order to complete her cargo, and was afterwards lost there while waiting for a wind: the Court were clear this was no deviation.

² *Metcalf v. Parry*, 4 Camp. 123.

ashore on the coast of Cuba, where by sea perils she lost a great part of her original cargo. She was then taken into the Havannah and repaired, and there, in addition to the remains of her original cargo, loaded on board a fresh cargo of colonial produce, with which she proceeded to her original destination. The freight earned from Havannah was held to be freight earned on the voyage insured, and, consequently, to be given up to the underwriters on abandonment.¹

Many instances occurred, during the pressure of Napoleon's Continental system, of a liberal interpretation of such clauses in those adventures generally called "Baltic risks;" not because the Court in such cases were guided by any peculiar principles of interpretation, but because the troubled and shifting nature of our relations with the different ports in the Baltic, under the political circumstances of the time, was such as to render the voyages then insured for those seas more vague in their objects, and less definite in their limits.

Goods were insured "at and from London to any port or ports in the Baltic, backwards and forwards, &c., with leave to touch and stay at any ports or places for all purposes whatever"; and, by another clause, "particularly with leave to wait for information *off* any ports or places." The ship went into the port of Carlshamn to wait for information, and while there an embargo was laid on her, and the goods were seized and confiscated. At the trial Lord Ellenborough intimated an opinion, that the words reserving liberty to wait off any port for information abridged the liberty of "touching and staying for all purposes;" and the jury accordingly found for the underwriters.

Rucker v.
Allnutt.

On motion for a new trial Lord Ellenborough altered his view of the case, and, with the concurrence of the Court, directed a new trial, principally on the ground that obtaining

¹ Barclay v. Stirling, 5 M. & Sel. 6.

information as to the political state of the Baltic ports was a necessary purpose intimately connected with the prosecution of such a voyage as that which was insured, in which no fixed ports of discharge were named, and the ship could not venture to proceed to any without first learning whether they were friendly or hostile.¹

Mellish v.
Andrews.

So, where a ship was insured "at and from London to the ship's discharging port or ports in the Baltic," with liberty "to touch at any port or ports for orders, or any other purpose," it was held no deviation for the ship, before she had fixed upon her port of discharge, to call for orders twice at the same port.² In this case, as Lord Ellenborough remarked, "the adventure is stated to be a voyage all over the Baltic, the object of the adventure was that the assured should call as often as necessity required, and there is nothing in the nature of the thing which makes calling again at the same port absurd or contrary to what may be presumed to have been the intention of the parties."³

When this case came before the Court of Error, the judgment of Lord Ellenborough was affirmed: but Sir Vicary Gibbs, who delivered the judgment in error, laid great stress on the point that no port of discharge had been fixed on when the ship put in a second time for orders; had this been otherwise, he thought she would then have been obliged to take the ports in their order of succession; as it was, he was of opinion that, under the terms of the policy, "the assured had a right to go backwards and forwards from port to port for orders as to his port of discharge, until his port of discharge was fixed."⁴

¹ Rucker v. Allnutt, 15 East, 278.

² Mellish v. Andrews, 2 M. & Sel. 26. On the former trial of the same case, Lord Ellenborough thought this was a deviation, especially as the policy did not contain the words "backwards and forwards" (see Mellish v. Andrews, 16 East, 312);

but in his judgment in 2 M. & Sel. he states that the non-introduction of these words could make no difference under the circumstances.

³ 2 M. & Sel. 34.

⁴ Andrews v. Mellish, in error, 5 Taunt. 496.

The two following decisions proceed upon, and perhaps in some degree extend, the same principle:—

A convict ship was insured on a voyage “at and from London to New South Wales, and at and from thence to the ship’s loading port or ports in the East Indies, Persia, China, or elsewhere, forwards and backwards, and backwards and forwards, as well on this side as on the other side of the Cape of Good Hope, until her safe arrival at her final port of discharge in Great Britain,” with leave for the ship “in the voyage insured, to proceed and sail to, touch and stay at any ports or places whatsoever, and wheresoever, and for any purpose whatsoever, without being deemed a deviation.” The ship, after arriving at New South Wales, and discharging her convicts there, sailed in ballast to Batavia, where she took in a cargo of iron for Sourabaya;—sailed to that port, discharged her iron there, and took in a cargo of rice for the Mauritius;—at the Mauritius she unloaded part of the rice, intending to load on board there a cargo of cotton for England, but being on survey found unseaworthy, was broken up there and sold.

Armett v.
Innes.

The jury found, at the trial, that the ship had not touched at too many places, nor stayed an unreasonable time, but had pursued the usual course on a voyage of this description. The defendant, however, contended, that the purpose of touching not only to load, but also to discharge goods, was a deviation; but the Court held that it was not so.¹ Park, J.: “The terms contained in the policy cannot be more general and extensive. The vessel might sail and touch at any ports or places whatsoever, for any purposes whatsoever. Is not trading a purpose? If an underwriter enters into a covenant of this kind it is his own fault.”

A merchant in this country having reason to expect a shipment of goods on his account from some of the ports of the Indian Archipelago, without knowing, however, of what nature they were, at what port to be loaded, or by what ship

Hunter v.
Leathley.

¹ Armett v. Innes, 4 J. B. Moore, 150.

to be sent, effected a policy on goods generally, on board of some one out of four different ships named in the policy (with leave to declare his interest more particularly, as it might thereafter appear), upon a voyage "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain or Holland," &c., "with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia,¹ or elsewhere, and also with permission to touch and stay at any ports or places in any direction, and for any purpose, necessary or otherwise, particularly Singapore, Penang, Malacca, Batavia, the Cape of Good Hope, and St. Helena, and to take on board, discharge, reload, and exchange goods and passengers, without being deemed a deviation."

Under this policy the ship took in part of her cargo at Batavia, and then proceeded to Sourabaya (another port in Java, lying 400 miles to the eastward of Batavia, and directly out of the course from Batavia, or any other of the four ports mentioned in the policy, to Europe), where she took on board the remainder of her cargo, and returned with it to Batavia, whence she sailed for Europe, and was afterwards lost by the perils of the seas. The Court of King's Bench held this putting into Sourabaya for the purpose of completing her cargo to be no deviation, and the Court of Exchequer Chamber subsequently affirmed the judgment.²

The purpose
of the visit.

2nd. The purpose for which a port is visited must be within

¹ It was expressly found by the special case that the nearest port or place in Persia was more than 1000 miles out of the direct course of a voyage from either Singapore, or Penang, or Malacca, or Batavia, to Europe.

² *Hunter v. Leathley*, 10 B. & Cr. 858; *S. C.* confirmed in error, 7 Bing. 517; 5 Moore & P. 457; 1 Cr. & J. 423; *S. C.* at N. P., Ll. & Wels. 244.

Lord Tenterden remarked, "That the order in which the four places named stood in the policy, showed clearly that a voyage in the direct geographical course was not thought of." 10 B. & Cr. 873. The geographical order is, 1. Penang; 2. Malacca; 3. Singapore; 4. Batavia. The order in the policy is, 1. Singapore; 2. Penang; 3. Malacca; 4. Batavia.

the scope of the adventure contemplated by the policy, otherwise the visit will be a deviation, notwithstanding the port visited is within the terms of the policy.

However extensive may be the language of the clauses, "the permission to stay 'for any purpose whatever,' must be for some purpose within the scope of the adventure."¹ "The liberty in the policy must always be construed with reference to the main scope of the voyage insured."²

Thus, where goods were insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation," Lord Ellenborough held that, notwithstanding the extensive terms in which this liberty was conceived, the ship, which had sailed with convoy, was guilty of a deviation by putting into Madeira, for the purpose of unloading goods and taking on board wines (which did not form part of the subject of the insurance), and there delaying, for that purpose, till after the convoy had proceeded on the voyage.³

Williams v. Shee.

A ship was insured on a voyage "at and from Para to New York," during her stay there, and at and from thence to Para, "with leave to call at all or any of the Windward and Leeward Islands on her passage to New York, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports or places she might call at or proceed to, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation, and without prejudice to that insurance." Under this extensive liberty, the ship, after sailing from Para, on her passage to New York, put into St. Thomas's and St. Bartholomew's, two of the Leeward Islands, not for any

Hammond v. Reid.

¹ Per Gibbs, J., in *Langhorn v. Allnutt*, 4 Taunt. 510, 519; see also *Rucker v. Allnutt*, 15 East, 278.

² Per Lord Ellenborough, in *Williams v. Shee*, 3 Camp. 469.

³ *Williams v. Shee*, 3 Camp. 469;

see also *Redman v. Loudon*, *ibid.* 503, which was a policy on the same ship for the same voyage, without the clause, and in which it was admitted there had been a deviation.

purpose connected with the voyage insured, but in order to obtain information for the shipowner whether the state of the market in those islands was such as to make it worth his while to send goods out there in another vessel of his, on a separate adventure from New York. The Court held that, although these islands were undoubtedly within the language of the policy, yet putting into them for a purpose wholly unconnected with the voyage insured, and which had reference to some new adventure subsequently to be undertaken in another vessel, was a deviation.¹

Solly v.
Whitmore.

A ship was insured on an outward voyage "at and from Hull to her port or ports of loading in the Baltic or Gulf of Finland, with liberty in the said voyage to touch and stay at any ports or places whatever, for all purposes, particularly at Elsinore, without being deemed a deviation." The ship's intended port of loading was Pillau; before sailing, however, she had taken goods on board for Elsinore and Dantzic, and on her voyage she stopped at both these places, in order to deliver those goods, and was afterwards lost before reaching Pillau; the Court held, under this policy, that the stopping to deliver goods, being a purpose wholly foreign to the main object of the voyage insured, was a deviation.²

A ship and cargo were insured "at and from Liverpool to the west and (or) south-west coast of Africa, during her stay and trade therein, and back to a port of call or (and) discharge in the United Kingdom." The vessel stayed a month on the African coast for the purpose of earning salvage; she was damaged while in that employment, and was afterwards, while on the voyage home, driven ashore on a savage part of Africa, and totally lost. It was held that salvage, in the absence of usage, could not be construed a purpose within the licence contained in the policy, and consequently that the risk had been substantially varied by what had been done.³

¹ Hammond v. Reid, 4 B. & Ald. 72.

² Solly v. Whitmore, 5 B. & Ald. 45.

³ Company of African Merchants

v. Brit. & For. Mar. Ins. Co., L. R., 8 Exch. 154.

Whether and how far purposes of salvage will justify deviation is considered *post*.

The same principles apply in the case of intermediate voyages, according as such voyages are or are not within the licence given by the policy. Intermediate voyages.

Thus, a ship was insured "at and from London to New South Wales, and at and from thence to all ports or places in the East Indies and South America," with liberty "to proceed and sail to, touch and stay at, any ports whatsoever, &c., for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards." Under this policy the ship sailed from London with convicts for New South Wales, and soon after arriving there the captain received orders from his employers to proceed from New South Wales to the East Indies. Before this, however, he had entered into engagements for a voyage to New Zealand and back again to New South Wales, and accordingly sailed on this voyage, intending to return to New South Wales, and then to sail, as directed by his employers, for the East Indies. On his way back, however, from New Zealand, his ship was lost, and the underwriters resisted payment, on one ground, amongst others, that as New Zealand lay entirely out of the course of the voyage from New South Wales to the East Indies, the sailing thither was a deviation, even under the extensive terms of this policy, and the Court, on the principle already stated, held that it was so.¹ Bottomley v. Bovill.

Upon the same principle, where an insurance was effected on goods on board a ship which, as appeared upon the face of the policy, was meant to act as a tender to other ships employed in the palm oil trade on the African coast, the Court held that it was a deviation for a ship so insured to sail away from the Benin river (where she had been for some time acting as a tender) to Cameroons with the cargo of one of the oil ships which had gone ashore at the bar of Hamilton v. Shedden.

¹ Bottomley v. Bovill, 5 B. & Cr. 210.

the Benin river, because instead of her subsidiary duties she had assumed the responsibilities of a principal voyage, yet the policy in this case was conceived and expressed in terms of the most extensive licence.¹

Trading no deviation, if without delay.

We come now to the consideration of those cases which establish the position, that if the ship, under the terms of the policy, was justified in *originally* visiting the port, any trading during her stay, although foreign to the main purposes of the adventure, is not a deviation, unless it causes additional delay, or otherwise substantially varies the risk. Formerly this was otherwise.²

Raine v. Bell. Ship and freight were insured on a voyage "from the ship's loading port or ports on the coast of Spain to London, with liberty to touch and stay at any port or place whatever, without being deemed a deviation." The ship was necessarily obliged to put into Gibraltar for a supply of provisions, and while there the captain also took on board some chests of dollars on freight. The putting into Gibraltar was justifiable, and no additional delay was caused by taking the dollars on board; the Court, therefore, held that there had been no deviation.³

The Court held in the same case that there had been no variation of the risk by taking treasure on board, and thereby

¹ *Hamilton v. Shedden*, 3 M. & W. 49.

The policy was "at and from Liverpool to any port or place of loading and trade on the African coast and islands, during her stay and trade there, and at and from thence to her port or ports of discharge in the United Kingdom, with leave to call at all ports and places, backwards and forwards, and forwards and backwards, in any order, for any purpose, without being deemed a deviation; and with liberty also for the said ship in the said voyage to proceed and sail to and touch and stay at any ports or

places whatsoever, and to load, unload, reload, sell, barter, and exchange goods, and property, &c., particularly with liberty to tranship," and with a memorandum "that the said vessel might be employed and used as a tender to any other ship or vessel in the same employ."

² *Stitt v. Wardell*, 1 Esp. 610; *Sheriff v. Potts*, 5 Esp. 95. This latter case may be supposed to have proceeded partly on the principle that *expressio unius est exclusio alterius*; but even then it is overruled by *Laroche v. Oswin*, 12 East, 131.

³ *Raine v. Bell*, 9 East, 195.

increasing the temptation to attack her, it being then a time of war.¹

So, where a ship was insured "from Stockholm to New York," it was held no deviation for the owner of live stock on board to take in provender for their use while the ship, as was then customary on such a voyage, was waiting at Elsinore for the purpose of taking convoy and paying Sound dues; the whole of such provender having been loaded on board before the Sound dues could be paid, so that no additional delay was thereby occasioned.²

Cormack v. Gladstone.

In the case of *Raine v. Bell*, where the policy was on ship and freight, Lord Ellenborough expressly reserved his opinion as to the effect of a change in the state of the cargo under a policy "on goods." The following case dissipates the doubt thus raised, and shows that it makes no difference whether the policy be on goods or any other subject of insurance.

Whether on ship or freight, or on goods.

Goods were insured on a voyage "at and from Gottenburg to a port or ports in the Baltic, with liberty, in case of non-admittance, to unload at Carlshamn." After the ship had sailed from Gottenburg with convoy, and while she was lying in Malmoe roads under orders of the commodore, a boat came alongside with some boxes of indigo, which formed no part of the original intended cargo, but the whole was got on board without any delay to the ship; the Court held this no deviation,³ "for the risk insured was neither enhanced nor varied; but something was done in the course of the voyage which made no difference in either, and therefore was no discharge of the underwriter's liability."⁴

Laroche v. Oswin.

The principle of interpretation thus established in English law has received abundant confirmation in the jurisprudence of the United States. Thus, where a ship, under liberty to touch and stay, sold part of her cargo, while detained in

Cases in the United States.

¹ *Ibid.*

³ *Laroche v. Oswin*, 12 East, 131.

² *Cormack v. Gladstone*, 11 East, 347.

⁴ *Per Lord Ellenborough*, 12 East,

133.

port by an embargo,¹ or while waiting for necessary repairs,² or for fear of capture,³ such trading was held not to amount to a deviation, because proved to have caused no delay and no variation of the risk.

It is otherwise if it cause delay.

In all such cases, however, additional delay, if caused by the trading, will amount to a deviation.

Any act of trading indeed, not contemplated by the parties to the policy, and unconnected with the main object of the adventure, is justifiable only on condition that it be completed during the period of the ship's lawful stay, at an allowed port, for a justifiable purpose.⁴

Nay, more, though the delay be partly for a purpose connected with the main objects of the voyage insured, if it be partly also for a purpose which is foreign, it will be held a deviation.

Inglis v. Vaux.

Thus, where a ship was insured on a West Indian voyage outwards "at and from Liverpool to Martinique, and all or any of the Windward and Leeward Islands, with liberty to touch at any ports or places whatever," it was held by Lord Ellenborough, that, though the captain, under the policy, was quite justified in putting into Antigua, to dispose of the residue of his outward cargo, yet he had no right to stay there longer than was reasonable for that single purpose; but he delayed partly to dispose of his outward and partly to procure a homeward cargo, and such delay was a deviation under the outward policy. "When," said his Lordship, "the disposal of his outward cargo ceased to be the sole reason of his stay, the underwriters on this policy on the outward voyage were discharged."⁵

Secus if no delay.

At the same time the mere fact of putting into a port with

¹ *Kingston v. Girard*, 4 Dall. R. 999.
274; *Condy's Marshall*, 189; 1 Phillips, no. 999.

² *Kane v. Columbian Ins. Co.*, 2 Johns. Rep. 264; 1 Phillips, no. 999.

³ *Hughes v. Union Ins. Co.*, 3 Wheaton's Rep. 159; 1 Phillips, no.

⁴ *Williams v. Shee*, 3 Camp. 469.
See Company of African Merchts. v. Brit. & For. Mar. Ins. Co., L. R., 8 Exch. 154.

⁵ *Inglis v. Vaux*, 3 Camp. 437.

a twofold purpose, partly connected and partly unconnected with the adventure contemplated by the policy, will not amount to a deviation, if there be no additional delay or variation of the risk caused by the unjustifiable purpose.

Thus, where a vessel sailing outwards from London to Grenada was insured on freight homewards "at and from Grenada to London," and on arriving at the island, where there is but one custom-house, proceeded to deliver her outward cargo in different bays there, and was lost in entering one of these bays for the two-fold purpose of delivering the remainder of her outward, and taking in a homeward, cargo, it was held that this was no deviation, and the underwriters were liable for the loss of the homeward freight.¹

Warre v.
Miller.

The line of distinction between the class of cases of which Hammond v. Reid is the leading authority and those which are governed by Raine v. Bell, though not at first sight obvious, is, nevertheless, clear and intelligible.

Distinction.

In Hammond v. Reid, and cases of that class, the ship would not have touched at the port at all except for some purpose totally unconnected with the main object of the voyage insured; and the execution of which purpose was itself the sole cause of the delay.

In Raine v. Bell, and the cases decided on the authority of it, the ship had originally put in, and was actually staying at, the port for a purpose connected with the voyage; and during her justifiable and necessary stay there, an act was done, which, though in itself unconnected with the adventure, and not originally contemplated by the parties to the policy, was held not to be a deviation, because there was no material variation of the risk, and no additional delay in consequence.

In Hammond v. Reid, the ship would never have touched at St. Bartholomew's at all, except for the purpose,—wholly alien to the object of the voyage insured,—of procuring information for the guidance of another adventure. In

¹ Warre v. Miller, 4 B. & Cr. 538; 1 Car. & P. 237.

Raine v. Bell, the ship, when the dollars were put on board, was actually staying at Gibraltar for provisions, without which the voyage insured could not have been prosecuted, and no extra delay or risk was incurred by taking the dollars on board.

Result.

The principles of law, therefore, applicable to the interpretation of these clauses, appear to be,—

1. That the extent of the powers they confer on the ship is to be judged of, not so much by verbal criticism of their terms (“to call,” “to touch,” or “to touch and stay”), as by reference to the true scope and nature of the adventure contemplated in the policy.

2. That, however extensive the language of these clauses may be, they can never confer a power of visiting ports out of what, upon a fair construction of the whole policy, appears to have been the course of the voyage insured as contemplated by the parties; nor can they justify the ship in visiting any port, even though within the local limits of the voyage insured, for any purpose unconnected with the main object of the adventure.

3. If the ship visits an allowed port for an allowed purpose, trading, breaking bulk, landing, or loading cargo, however alien to the main object of the adventure, is held to be no deviation, if completed during the period of the ship’s justifiable stay in the port, without additional delay, or substantial variation of the risk in consequence.

4. If, however, there be trading such as gives rise to delay that would not otherwise have been incurred, it will, on that ground, amount to a deviation.

Deviation by
reason of
delay.

As the sole ground on which a deviation discharges the underwriter is that it varies the risk, and as that may be brought about as much by delay in commencing or prosecuting the voyage as by local divergence from its prescribed course, it follows that every such delay, if unreasonable or

unexcused, will discharge the underwriter. In the words of Tindal, C. J., "The voyage in the commencement or prosecution of which any unreasonable delay takes place, becomes a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended by all parties when the policy was effected."¹

To begin with the commencement of the voyage,—any unreasonable delay under an insurance "at and from," between the time when the policy attaches "at" the port, and the time when the ship sails on her voyage, will discharge the underwriter.²

Delay in
commencing
the voyage.

As long, indeed, as she is *bonâ fide* preparing for her voyage, by repairs, or the like, the delay will be excusable and the underwriter liable; but if all thoughts of the voyage be laid aside, and the ship still detained in port, the underwriter is discharged.³

So, although the voyage be not abandoned, yet any waste of time, or unnecessary delay in port, not excused by justifying cause, nor in any degree connected with the purposes of the voyage insured, is held to vary the risk; as where a yacht lying in Bristol harbour was insured on a voyage "at and from Bristol to London," and did not sail for five months after the policy was effected.⁴

That an unreasonable delay in performing the voyage insured is equivalent to a deviation, was expressly ruled by Lord Mansfield, in the case of *Hartley v. Buggin*, in which, the ground of defence being the detention of the ship as a floating slave dépôt on the African coast, his Lordship said, "The single point before the Court is, whether there

¹ Per Tindal, C. J., in *Mount v. Larkins*, 8 Bing. 108, 122.

² Delay, when it prevents the policy attaching, properly belongs to the subject of the preceding chapter, and is considered there.

³ Per Lord Hardwicke in *Motteux v. London Ass. Co.*, 1 Atkyns, 545; *Chitty v. Selwyn*, 2 Atkyns, 359.

⁴ *Palmer v. Marshall*, 8 Bing. 79, 317.

has not been what is equivalent to a deviation—whether the risk has not been varied, no matter whether the risk has or has not been thereby increased.”¹

Samuel v.
Royal Exch.
Ass. Co.

Where a ship insured “at and from Sierra Leone to London” was delayed in the Thames, off Deptford Dockyard, from the 18th to the 27th of February, before she was admitted into the dock to unload her cargo, it was not disputed that this delay, if unexcused or unnecessary, would amount to a deviation at that, as at any other, stage of the voyage.²

Hamilton v.
Shedden.

On the same ground, where a vessel engaged in the African palm oil trade, with liberty to act as a tender to other ships in the same employ, was kept thirteen months in the Benin river, this was found by the jury to be an unreasonable delay, and the Court refused to disturb their verdict.³

In short, whenever the delay exceeds a reasonable time, though for a justifiable purpose, or is incurred for purposes unconnected with the true object of the voyage insured, it will amount to a deviation.

Deviation of
necessity.

This rule is so strictly observed, that, even where the ship quits from necessity the course prescribed by the policy, she must compass this inevitable detour by the most direct course, and in the shortest time, otherwise it will amount to a deviation.⁴

The Carnatic, a French East Indiaman, was insured “at and from Port L’Orient to Pondicherry, Madras, and China,

¹ *Hartley v. Buggin*, 2 Park, Ins. 652. See the case of a fire policy distinguished on this particular from a voyage policy, in *Pearson v. The Commercial Union Ass. Co.*, 15 C. B., N. S. 304; 33 L. J. (C. P.) 85; on appeal, L. R., 8 C. P. 548; and in the Lords, 1 App. C. 498: per Kelly, C. B., “This is not the case of an insurance on a voyage, but an insurance against fire for a certain period of time in certain specified places.” Therefore a loss by fire during a

delay justified by usage in a place which might fairly seem to fall within the description in the policy, had it been a voyage policy, was held not to be covered, as it was a fire policy, and as the loss had occurred beyond the limits of place, probably of time, expressly specified.

² *Samuel v. Royal Exch. Ass. Co.*, 8 B. & Cr. 119.

³ *Hamilton v. Shedden*, 3 M. & W. 49.

⁴ 3 Kent, Com. 315.

and at and from thence back to the ship's port or ports of discharge in France." On her arrival at Pondicherry she was found to be so much damaged that it became necessary for her to go to Bengal for repairs, that being the only place where the repairs could be properly done. The usual time in which the direct voyage from Pondicherry to Bengal is performed is about six or seven days; but *The Carnatic*, by touching and trading at different intermediate ports, consumed six weeks in going to Bengal, and about two months in returning thence to Pondicherry. Lord Mansfield said, that even if necessity were admitted to have been the sole motive for substituting the voyage to Bengal in the place of that to China, still it was incumbent on the assured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner, and that the delay in going from Pondicherry to Bengal, and the repeated stoppages by touching at different places and trading there, were deviations which discharged the underwriter.¹

If a vessel is driven out of her course, it is not necessary that she should retrace her route to the point of divergence; but she must prosecute her voyage by the safest and most direct course from the point to which she may have been so driven.²

As every special clause contained in the policy must be strictly construed, it follows that, if express permission be given in the policy to delay for a given time specified in the policy, that delay cannot lawfully be prolonged. Thus, where liberty was given in the policy "to wait two months at Monte Video if needful," a longer delay than two months was held to discharge the underwriters.³

Limit of express leave.

It is only, however, an unreasonable or inexcusable delay, *i. e.*, a wilful and unnecessary waste of time, that will amount

Justifiable delay no deviation.

¹ *Lavabre v. Wilson*, 1 Dougl. 284. T. R. 22.

² *Harrington v. Halkeld*, 2 Park,

³ *Doyle v. Powell*, 4 B. & Ad. 267.

Ins. 639; *Delaney v. Stoddart*, 1

to a deviation. If justified by necessity, or incurred *bonâ fide* with a view to the purposes of the voyage insured, the underwriter will not be discharged by the delay, although its absolute duration may be very considerable.

- Ellenborough. "To discharge the policy," says Lord Ellenborough, "there must be a clear imputation of waste of time; mere length of time elapsing between the sailing of the vessel and the underwriting of the policy, is not of itself sufficient, if it is capable of explanation."¹
- Story. "What delay will constitute a deviation," says Story, J., "depends on the nature of the voyage and the usage of trade. That delay which is necessary to accomplish the object of the voyage, according to the course of the trade, if incurred *bonâ fide*, cannot be admitted to avoid the insurance."²
- Tindal. So Tindal, C. J., lays it down, that the "detention for a reasonable time, for the purposes of the adventure, must be allowed; and, whether the delay be reasonable or not, must be determined not by any positive or arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be."³

Smith v. Surridge. A ship insured the 15th of May, "at and from Pillau to London," and at that time lying at Pillau, was obliged to undergo thorough repairs there before she could sail on the voyage insured. These repairs were not completed till the end of June, when the water in the harbour had become so low that she could not get over the bar, and for the same reason did not actually sail till November. Lord Kenyon held that this was not such a delay as to discharge the underwriter.⁴

Grant v. King. A policy was effected in August, 1789, on an American ship "at and from Brest to London," against British capture, while she was lying in Brest harbour, and while that port was under blockade by the British. As the ship did not sail

¹ Grant v. King, 4 Esp. 175.

^{*} In Phillips v. Irving, 7 M. & Gr.

² In Columbian Ins. Co. v. Catlett,

328.

12 Wheaton's R. 283; 1 Phillips,

⁴ Smith v. Surridge, 4 Esp. 25.

Ins. no. 1002.

till March, 1790, it was contended that this delay of nearly seven months discharged the underwriter; but proof having been given that the voyage had never been abandoned, and that the time had been consumed in *bonâ fide* attempting to procure an American crew from England (there being no possibility of doing so in France), a special jury, under the direction of Lord Ellenborough, found for the plaintiff.

Lord Ellenborough told the jury, that while the vessel was in a fair state of preparation for the voyage, it was covered by the policy; but if the voyage was abandoned for a length of time, the underwriters would be discharged. "The question whether there was an abandonment of the original adventure is to be decided," said his Lordship, "from a fair review of all existing circumstances at the time when the voyage might reasonably be presumed to commence. Here the extreme difficulty of obtaining men is to be taken into consideration."¹

The main point in all these cases is, whether the delay were *bonâ fide* incurred with a view to promote and carry out the main objects of the voyage insured. When is delay justifiable?

Thus, where a vessel, chartered for the timber trade between this country and the United States, was insured on a voyage "from London to her loading port in Virginia and back to London," it was held that waiting fifteen months at Norfolk, her loading port, until an embargo was taken off, and long enough afterwards to take on board a cargo of lumber there, was not a deviation, although the ship might have sailed home in ballast immediately the embargo was laid on.² Schroder v. Thompson.

So, where the captain of a ship, insured on a trading voyage to all or any ports in the North or South Pacific Ocean, delayed one hundred and nine days at one of the ports in those seas, in the hope of getting permission to land her outward cargo, for which purpose he was, during that Bain v. Case.

¹ Grant v. King, 4 Esp. 174.

² Schroder v. Thompson, 7 Taunt. 463.

time, negotiating with the government; a special jury, under the direction of Lord Tenterden, found that the delay, under the circumstances, was not unreasonable.¹

Phillips v.
Irving.

Likewise, where a seeking ship insured on a trading voyage "at and from London to Bombay, and thence to China and back to the United Kingdom," stayed at Bombay for more than six months after she was ready to take in cargo there, for the purpose of procuring a remunerative freight, such delay was held to be no deviation, since it was justified by a purpose strictly connected with the main object of the adventure.²

The law is
the same in
the United
States.

In the jurisprudence of the United States the same principle has been illustrated by several decisions, which appear to have proceeded on a very sound application of general rules.³ Thus, if a vessel enters a port to dispose of her cargo, it has been decided by Story, J., that the master may stay there a reasonable time for that purpose, though he meets with no success. In the case alluded to, insurance was made on a cargo of flour "from Alexandria to St. Thomas, and two other West Indian ports, and back to the United States;" and the ship on arriving at St. Thomas remained there seventy-two days, during which time the master endeavoured, but with only partial success, to dispose of his outward cargo at the price limited by his instructions: the Court held this delay no deviation, although it was proved that the captain might at once have sold his flour at half a dollar per barrel less than the limited price.⁴

Per Story, J.

In answer to the argument that the delay to procure the limited price was unreasonable, Story, J., in delivering the judgment of the Court, says, "In almost every voyage of this nature, where different ports are to be visited for the

¹ Bain v. Case, 3 C. & P. 496. See also *Suydam v. Marine Ins. Co.*, 2 Johnson's R. 143; 1 Phillips, Ins. no. 1002.

² Phillips v. Irving, 7 M. & Gr. 325.

³ See 1 Phillips on Ins. no. 1002; and especially *Suydam v. Marine Ins. Co.*, 2 Johnson's R. 143; *Lapham v. Atlas Ins. Co.*, 24 Pickering, R. 1.

⁴ *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 283; 1 Phillips, no. 1002.

purposes of trade, and to seek markets, it is almost universal to prescribe limits to the price of sales. It cannot be that the master, if entitled to go to a single port only, is bound to sell, at whatever sacrifice, as soon as he arrives at that port, and within that period within which he might unload and reload a return cargo. He must, from the very nature of the case, have a discretion on the subject. He is not bound to sell the whole cargo at once, whatever may be the sacrifice, and thus frustrate the projected adventure. He must exercise in this, as in all other cases, a sound discretion for the interests of all concerned. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay, after all reasonable expectations of a change of market were extinguished, such circumstances might probably be left to a jury to infer a delay amounting to a deviation."¹

Lord Kenyon once held that the mere fact of carrying letters of marque, without the consent of the underwriters, was a fatal deviation, for, although she had made no use of them, nor had deviated, such letters were a temptation to deviate.³ This law, however, must now be considered as overruled.

Deviation by
cruising.²

The same learned Judge, on a subsequent occasion, admitted that the case was decided on principles which were new, and which went to the very verge of the law;⁴ and he refused to extend them to a case where it clearly appeared that the letters of marque were taken on board without any

Letters of
marque on
board.

¹ See also *Ellery v. New England Ins. Co.*, 8 Pickering, R. 14.

² It might have been hoped, since the Declaration of Paris, 1856, abolishing privateering, that the practical value of the decisions here collected would be reduced to a mere illustration of general principles. Until, however, the United States

have acceded to the views of the Allied Powers, it is impossible to say that in these decisions are not to be found those practical rules which the course of events may hereafter bring into actual use.

³ *Dennison v. Modigliani*, 5 T. R. 580.

⁴ See 6 T. Rep. 382.

intention of cruising, but solely for the purpose of more easily procuring a crew.¹

Later Judges have demurred entirely, not only to the law thus laid down, but to the principles on which it was put. Lawrence, J., says: "If an intention to deviate not carried into effect will not avoid a policy, still less can a temptation to deviate."² And Lord Ellenborough declares, that, although it was formerly considered that the mere taking letters of marque aboard, without the consent of the underwriter, vitiated the policy, from the temptation it held out to privateering, yet that the more general opinion now is, that a "mere irritation of this sort shall not operate as a deviation."³

How far a ship, on a mere mercantile adventure, carrying letters of marque, with the consent of the underwriters, but without express liberty in the policy so to do, would be justified in departing from the direct course of the voyage insured, seems to have been subject for doubt.

Rule.

Cruising is a deviation for a trading ship.

The true principle appears to be, that no departure from the usual course of the voyage, occasioned by repelling hostile force, or even attacking an enemy's ship, will be held to be a deviation, provided it be fairly attributable to motives of self-defence; if, however, such a vessel cruises from a desire of profit, *i. e.*, lies by, or departs from the direct course of the voyage, in hope of meeting with prizes, that is a deviation.⁴

Justifiable exceptions.

It is at the same time admitted, that if an enemy comes in the way, she may engage in her own defence, and prosecute the engagement to capture, even though in so doing she may be obliged to depart from the direct course of the voyage.⁵ It appears equally clear, that if an enemy comes across her course, she may attack and take him from other

¹ *Moss v. Byrom*, 6 T. Rep. 379.

² In *Raine v. Bell*, 9 East, 195, 201.

³ *Jarratt v. Walker*, 1 Camp. 263, 266.

⁴ *Cock v. Townson*, 2 Park, Ins. 630. As to what constitutes cruising, see *Syers v. Bridge*, 2 Dougl. 527.

⁵ *Jolly v. Walker*, 2 Park, Ins. 630; *Parr v. Anderson*, 6 East, 202.

tives than those of self-defence, if the so doing does not involve any departure from the direct course of the voyage.¹

The really doubtful point is, whether a ship so circumstanced has a right to alter her course for the purpose of chasing a strange sail. What is unjustifiable.

In one case that came before Lord Mansfield, a special jury returned their verdict, under his Lordship's direction, at an armed merchant vessel, insured on a trading voyage from London to the West Indies, and having letters of marque on board, but no express liberty to carry them, on discovering a strange sail in her course, gave chase, and continue such chase till she came up with her, though in the pursuit she was obliged to depart from the direct course of the voyage, and had once lost sight of the vessel she was chasing.² Jolly v. Walker.

In a subsequent case that came before Lord Ellenborough, there a merchant ship, insured on a trading adventure, but carrying letters of marque under an express licence, on seeing a strange sail a quarter of a point on her lee bow, altered her course to that extent, and gave chase; his Lordship was strongly inclined to think that, if this departure from the course was for the purpose of hostile capture, it was a deviation; but if it were *bonâ fide* for the purpose of defence, as, making a show of confidence to deter the enemy from attack, or with a view to obtain some advantage in the contest, or the like; in that case it was no deviation.³ Parr v. Anderson.

The subject has occupied the attention of the Courts of the United States,⁴ and the law has been laid down by Story, J., in the following terms:—"Whether a vessel be commissioned or not, she has a right to repel any attempt of an enemy, and to protect and defend herself by all In the United States.

Jolly v. Walker, 2 Park, Ins.

Ibid.

Parr v. Anderson, 6 East, 202.

See the case of Wiggin v. Amory,

13 Massachusetts R. 127; Wiggin v. Boardman, 14 Mass. R. 12; Haven v. Holland, 2 Mason's R. 230; 1 Phillips, Ins. nos. 1029, 1030.

reasonable precautions, against a meditated hostile attack. If a vessel, supposed to be an enemy cruiser, be in sight, and apparently intend to attack a merchant vessel, the master of the latter is bound to exert his best skill and judgment as to the time and mode of his defence; and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavour to make his escape in the first instance; and on failure of this, to meet the enemy. He may lie to, or chase the enemy, if he deem that the most effectual way to secure his object. The only question in cases of this nature is, whether what is done be fairly attributable to motives of self-defence, or to motives of another nature—such as a desire to profit; if the latter, then it is a deviation.” The learned Judge accordingly held that delay for the purpose of manning a prize justifiably captured by a merchant ship carrying letters of marque, but without express liberty so to do, was no deviation. The right to make the capture at all drew after it the right to make the capture effectual; and it would be most mischievous to the interests of trade to discourage men from making a gallant defence, by the knowledge that in no event could they reap the reward of their victory.¹

Chancellor Kent, in his Commentaries, speaks of this case as having confided to the captain a pretty enlarged discretion as to the best mode of defence, and one carried to the very verge of the law;² but the decision seems conformable to the spirit of the maritime law, if not to the very letter of the earlier authorities.

To man a prize.

Under leave
“to cruise,”
“to carry
letters of
marque,” &c.

The cases hitherto considered have been principally those in which the policy has contained no clauses empowering the ship “to cruise,” “to carry letters of marque,” &c. The general rule with regard to all such permissions, is that they should be construed strictly, so as not to extend their force beyond the plain meaning of the words in relation to the

¹ Haven v. Holland, 2 Mason’s Rep. 230.

² 3 Kent, Com. 316.

subject matter and the intention of the parties as collected from the whole of the document.¹

Thus, where a ship was insured, "with liberty to cruise six weeks," this was held to mean six weeks successively from the commencement of the cruise. "The meaning of the clause," said Lord Mansfield, "is, I will excuse a deviation for six weeks."²

Syers v.
Bridge.

A ship, insured on a slaving voyage, "with or without letters of marque," saw a sail which afterwards proved to be an enemy, about a quarter of a point on her lee bow; she altered her course accordingly, and gave chase, but after about a quarter of an hour abandoned it, and returned into the direct course of the voyage insured. Lord Ellenborough, at the trial, and afterwards in banc, strongly inclining to think this a deviation, said, "That under such a liberty of carrying a letter of marque, no deviation from what would otherwise be the natural and ordinary course of the voyage, for the purpose of pursuing (in quest and for the chance of a prize) vessels which, at the time of instituting such pursuit, were not even known to belong to the enemy, was warranted."³ On a new trial, it appeared that the ship had clearly been engaged in cruising, which discharged the underwriter, and put an end to all questions as to the construction of the clause.⁴

Parr v.
Anderson.

When such clauses contain an express permission to do certain specified things, they come under the principle *expressio unius est exclusio alterius*, and the permission cannot be extended to objects not mentioned.

Exclusive
effect of a
positive per-
mission.

Thus, where a ship was insured on a slaving and trading adventure, "with or without letters of marque, with leave to chase, capture, and man prizes," Lord Ellenborough held, that this permission did not authorize the captain, after

To man, not
to convoy.
Lawrence v.
Sydebotham.

¹ Per Lord Ellenborough, in *Lawrence v. Sydebotham*, 6 East, 45, 51.

205.

² *Syers v. Bridge*, Dougl. 527.

* 2 Park, Ins. 632; and see, as above, 1 Phillips, Ins. nos. 1029, 1030; 3 Kent, Com. 315.

³ *Parr v. Anderson*, 6 East, 202,

taking a prize, to shorten sail and lie to, in order to convoy it to port, although that port was within the limits of the voyage insured. "On the short point of the case," says Lord Ellenborough, "my opinion is, that a liberty to chase, capture, and man, cannot be extended beyond what is necessary for the performance of those acts, and that the convoying the prize afterwards does not necessarily arise out of such liberty."¹ Yet it is to be assumed in such a case that the mere act of convoying a prize to port under such liberty, is not *per se* a deviation, unless it involves delay, or departure from the direct course of the voyage, and it has been so held in the United States.²

To "capture, man, and see into port" is not to delay in port.

Jarratt v. Ward.

Where a ship was insured for the Southern whale fishery, with leave to carry letters of marque, and "to cruise for, chase, capture, man, and see into port any enemy's ships," this was held not to authorize the assured to remain in port while the prize was receiving necessary repairs there, but, at most, to see the prize moored safely, and give the necessary orders for its final destination.³

Restricted in locality.

Hibbert v. Halliday.

So, where a ship, also insured for the Southern whale fishery, with liberty "to chase, capture, and man prizes, &c., and also to cruise thirty-one days, either together or separate, anywhere and in any latitude on the outward-bound passage, on this side of Cape Horn," lay to for nine days, for the purpose of capturing a prize, off a port within the limits of her fishing ground, but on the other side of Cape Horn, the Court held: 1st. That such lying to was not within the liberty to chase, capture, or man, but was a cruising; 2nd. That, as such, it came within the clause giving liberty to cruise for thirty-one days on this side Cape Horn, and, therefore, that having taken place on the other side of Cape Horn, it was a deviation.⁴

From the above cases it sufficiently appears that the real

¹ Lawrence v. Sydebotham, 6 East, 45, 52.

³ Jarratt v. Ward, 1 Camp. 264.

⁴ Hibbert v. Halliday, 2 Taunt.

² Ward v. Wood, 13 Mass. R. 539; 428.

¹ Phillips, Ins. no. 1030.

ground of the underwriter's discharge is substantial variation of the risk. Such a change of risk, although not arising from any of the causes hitherto considered, is a good defence to the action, if the underwriter can show it to have arisen from culpable intention or gross negligence, but not otherwise.

Whatever
varies the
risk.

Thus, where it appeared that three Spanish prisoners of war, who had been taken on board on parole, without the knowledge of the underwriter, had, together with the crew, mutinously run the ship ashore, and the assured on goods brought an action on the policy as for a loss by barratry, Lord Ellenborough held, that, though the taking these men on board might slightly have increased the risk, yet, as there was no culpable intention in taking them on board, in the first instance, nor any gross negligence in watching them afterwards, the underwriter could not defend the action on the ground that the risk had been thereby varied.¹

Toulmin v.
Inglis.

We come now to consider what causes and circumstances justify or excuse deviation. We have seen, by the definition, that only a voluntary and inexcusable departure from the course of the voyage will amount to a deviation, so as to discharge the underwriter from subsequent loss.

Causes that
justify devi-
tion.

If produced by ignorance of the captain, it will not be the less considered a voluntary act on the part of the assured, for it was his fault not to have appointed a competent master.²

Hence, where a ship, insured on a voyage "at and from London to Jamaica," while proceeding direct to the latter place, was driven out of her course by strong currents and other circumstances, to a point between the Grand Canary and Teneriffe, from which point her direct course to Jamaica was south-west, but as, instead of taking this course, the

¹ Toulmin v. Inglis, 1 Camp. 421. not appoint the master; but he un-

² This applies to the assured, on undertakes that the ship is seaworthy. goods quite as much. True, he does

captain ignorantly bore up for Santa Cruz, thirty miles to the north-west, this was held to be a deviation.¹

Moral or physical force, or other justifying cause.

But if it be necessitated either by moral or physical force, or excused by a justifying cause, it is not such a deviation as discharges the underwriter. *Si iter mutaverit magister ex aliquâ justâ et necessariâ causâ, puta ex causâ refectionis navis, vel ad evitandam maris tempestatem, vel ne inciderit in hostibus, in istis casibus, mutato itinere, tenetur assecurator.*² "There is not, probably, any exception to be met with," says Chancellor Kent, "to the application of the general rule, that if the vessel departs from the usual course of the voyage from necessity, and departs no further than that necessity requires, the voyage will still be protected by the policy."³

The deviation must be no more than commensurate with the necessity.

The delay, or departure indeed, must be strictly commensurate with the necessity that justifies it; there must be no waste of time, nor any needless divergence from the course of the voyage.⁴ On this there is no doubt; the only difficulty is in ascertaining—(a). What degree of force or constraint will amount to such an unavoidable necessity as, on that ground, to justify a departure from the course of the voyage; —(b). What circumstances, short of such unavoidable necessity, will excuse the ship in departing from, or delaying, the usual course of the voyage.

What is unavoidable necessity.

(a). With regard to what amounts to an unavoidable necessity, we have the following decisions in this country:—

Violence of mutinous crew.

Where the crew of a letter of marque mutinously insisted on their captain's returning home with a prize he had taken, instead of proceeding on the voyage, and, on his remonstrating, forced him to submit; this compulsory return was held not to be such a deviation as to discharge the underwriters.⁵ So, where a crew, dreading the attacks of pirates

¹ *Phyn v. Royal Exch. Ass. Co.*, 7 T. R. 505.

² *Roccus*, not. 52, 53, cited 2 *Emerigon*, c. xiii. s. 15, p. 94. See also 2 *Benecke, des Assecuranz*, c. viii. s. 2.

³ In *Robinson v. Marine Ins. Co.*, 2 Johnson's R. 89.

⁴ *Lavabre v. Wilson*, 1 Dougl. 284.

⁵ *Elton v. Brogden*, 2 Strange, 1264.

if they pursued the voyage, all left the ship and refused to return to her, unless the captain would promise immediately to sail back to the home port; his returning thither in pursuance of such promise was held no deviation.¹

Where a neutral ship was carried out of her course by a British cruiser, and detained in a port far out of the limits of the policy for about six weeks, this was held to be no deviation, having been caused by overruling necessity.²

A ship of war.

On the other hand, where the master of a merchant ship, while he lay at a port in Iceland taking in his loading, was ordered by the captain of a king's ship to go out to sea and examine a strange sail in the offing bearing enemy's colours, which he did, without any remonstrance on his part, or any threat of force on the other, his so doing was held to amount to a deviation.³

Not mere orders by a king's ship.

On the whole, therefore, it appears that when a deviation is sought to be justified on the ground of unavoidable necessity, it must be shown that a degree of force was exercised towards the captain, which either physically he could not resist, or morally, as a good subject, he ought not to resist.⁴

Result.

The principle illustrated in these decisions has been followed and maintained in the decisions of the Courts of the United States.⁵

(b). Where departure from the course has not been caused by force or constraint, moral or physical, it may be laid down as a general rule that it cannot be excused, unless the state of circumstances be such as to leave the master no alternative, as a reasonable and prudent man, exercising a sound judgment, and acting for the best interests of all

Causes short of constraint which yet justify deviation.

¹ *Driscoll v. Bovil*, 1 B. & P. 313.

² *Scott v. Thompson*, 1 B. & P. N. R. 181.

³ *Phelps v. Auldjo*, 2 Camp. 350.

⁴ *Per Lord Ellenborough*, 2 Camp. 351.

⁵ *Winthrop v. Union Ins. Co.*, 2

Washington's Circ. C. R. 7; *Lee v. Gray*, 7 Mass. Rep. 349; *Wiggin v. Amory*, 13 Mass. Rep. 123; *Kettell v. Wiggin*, 13 Mass. Rep. 68; *Robertson v. Columbian Ins. Co.*, 8 Johnson, 383.

concerned, but to depart from, or delay the usual course of the voyage.

Those circumstances that are short of actual constraint and force, and are yet generally held to excuse a deviation, may be thus enumerated:—1. Making a port to refit; 2. or to recruit the crew when generally disabled by sickness, &c.; 3. Stress of weather; 4. Endeavouring to avoid capture; 5. or to join convoy; 6. or to succour ships in distress.

Making a
port to refit.

1. *Making a port to refit.*—The going into a port out of the usual course for necessary repairs and staying till they are completed, is never held to be a deviation, provided it plainly appear that such repairs under the circumstances and at such port were reasonably necessary, and the delay not longer than was requisite for repairs to enable the ship to proceed on her voyage.¹ Thus, in one case, where a captain, finding he had too little ballast to steady his ship, at the importunity of the crew, and to save his and their lives, put into a port out of the course of the voyage, where he took in 500 rolls of tobacco as ballast;² and in another case, where an overladen ship, shortly after sailing, put back into a port out of the course of her voyage, to unload part of her cargo;—this was held no deviation.³ It must be added that both the cases here cited in illustration of a well-established rule of insurance law are cases of unseaworthiness at sailing; that this objection seems not to have been taken in the first of them, and that the same objection in the second was prevented by express licence indorsed on the policy by the insurers to go into Ramsgate and discharge part of her lading.⁴

¹ *Motteux v. London Ass. Co.*, 1 Atkyns, 545.

² *Guibert v. Readshaw*, 2 Park, Ins. 637.

³ *Weir v. Aberdeen*, 2 B. & Ald. 320.

⁴ See this misreported and universally misunderstood case of *Weir*

v. Aberdeen, cleared up in the judgment of the Privy Council pronounced by Lord Penzance in *Quebec Mar. Ins. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234, 244. And also *post*, Part II. Chap. IV., WARRANTY OF SEAWORTHINESS.

And, of course, if the ship does not find in the first port she enters what is indispensable to refit her, she may seek it in a second, without being deemed to have deviated.¹

2. *To recruit a disabled crew, or procure fresh hands.*—There appears to be little doubt that if a ship, which was originally sufficiently manned and equipped for the voyage, were in the course of it to lose so great a proportion of her officers or crew by sickness or other cause, that it became impossible to continue the voyage without procuring more, and no more could be procured except by making a port out of the direct course of the voyage, the putting into such port for that purpose would not be held a deviation.

To procure fresh hands.

Thus, at Nisi Prius Lord Eldon admitted, "That if by the visitation of God so many of the crew, who were otherwise sufficient, became so afflicted with sickness as to be incapable of managing the ship, such an illness of the crew was a necessity which might justify a deviation."²

So, it has been held in the United States, and apparently on good grounds, that the death of all the superior officers of an East India ship justified the crew in putting into the Isle of France, though out of the course of the voyage.³

It must be carefully borne in mind, however, that going out of the course for such purposes can only be justified when the ship was adequately manned, equipped, and stored in the first instance; if the ship when she sailed was deficient in any of the elements of seaworthiness, the going into port to supply such deficiency, however necessary it may be, will be deemed a deviation.

Secus, if vessel were originally inadequately fitted out.

Thus, where a ship put into a port, out of her course, in order to procure medicines and medical assistance, with which she ought to have been adequately provided when she sailed; this was held to amount to a deviation.⁴ So, where a ship, which ought to have sailed with a full complement of

¹ *Hall v. Franklin Ins. Co.*, 9 Pickering's Mass. Rep. 466; 1 Phillips, Ins. no. 1020.

² In *Woolf v. Claggett*, 3 Esp.

257.

³ *Winthrop v. Union Ins. Co.*, 2 Washington's Circ. C. Rep. 7.

⁴ *Woolf v. Claggett*, 3 Esp. 256.

men engaged for the whole voyage, sailed with two of her number engaged for part only of the voyage, and put into a port out of the limits of the policy in order to supply that deficiency, this was held a deviation.¹ Upon the same principle, the fact of a ship, insufficiently provisioned at the outset for the voyage going off the course to procure provisions will, as a general rule, discharge the underwriter on the ground of deviation.² It would be otherwise were such lack of provisions wholly due to exhaustion during unavoidable delay, through contrary winds or the like.³

Stress of
weather.

3. *Stress of weather*.—It is no deviation, if a ship be driven out of her course by stress of weather; or if the captain puts into a port out of his course, or delays his sailing, to take refuge from a tempest, or to wait for a wind, provided that in so acting the captain did what a prudent man, in the exercise of sound judgment, would have done under the circumstances with a view to the benefit of all concerned. Consequently, a ship driven out of her course is under protection of the policy though lost before she can get back into her course; and a ship so driven by stress of weather from her course is not obliged to sail back to that point whence the storm drove her; she is to make the best of her way to her port of destination from the point where she finds herself.

Harrington v.
Halkeld.

Thus, a ship, insured "from London to St. Kitts," was separated from her convoy by a storm, and was afterwards captured while still out of her course, but taking the best course for St. Kitts or the convoy; Lord Mansfield held this was no deviation.⁴

Delaney v.
Stoddart.

So, where a ship, insured from St. Kitts to London, was driven by a storm off St. Kitts with only part of her cargo got on board, and was obliged to run to St. Eustatius, and

¹ Forshaw v. Chabert, 3 B. & B. 158; *S. C.*, 6 J. B. Moore, 369.

² See the American case of Kettell v. Wiggin, 13 Mass. Rep. 68.

³ See Raine v. Bell, 9 East, 195;

and Thomas v. Royal Exch. Ass. Co., 1 Price, 195.

⁴ Harrington v. Halkeld, 2 Park, Ins. 639.

after many unsuccessful efforts to get back to St. Kitts; she gave up the attempt, and completed her lading at St. Eustatius, whence she sailed for London; Lord Mansfield held this no deviation, and said, "If a storm drive a ship into any port out of the course of her voyage, and, being there, she do the best she can to return to her port of destination, she is not obliged to return back to the port whence she is driven."¹

Upon the same principle, it has been suggested by Lord Ellenborough, in this country,² and held in the United States, that if a ship find her port of destination blocked up by ice, or otherwise rendered physically inaccessible, she may make the nearest practicable port, with a view of staying there till her own is open, without its being deemed a deviation.³

Where a captain being delayed by adverse winds and dangerous weather puts into a roadstead for safety, it has been decided to be no deviation to send ashore for provisions, if requisite.⁴

4. *Endeavour to avoid Capture*.—The endeavour to avoid the imminent peril of capture, either by lying in the port of loading, or putting into a port out of the course of the voyage, or by departing from the track of the voyage insured, has always been held to justify a deviation, provided the danger was real and immediate, or the apprehension were founded on reasonable grounds.⁵ To avoid capture.

So a ship, insured "against capture in her port of loading," may hurry out of such port to avoid the imminent peril of capture, though only half loaded and totally unprepared for her voyage; and putting into a port afterwards out of the course of her voyage, in order to repair damage occasioned

¹ *Delaney v. Stoddart*, 1 T. R. 22.

² *Blackenhagen v. London Ass. Co.*, 1 Camp. 453.

³ *Graham v. Commercial Ins. Co.*, 11 Johnson's Rep. 352, cited 1 Phillips, Ins., no. 1023.

⁴ *Thomas v. Royal Exch. Ass. Co.*,

1 Price, 195.

⁵ *Driscoll v. Bovil*, 1 B. & P. 313; *Driscoll v. Pasmore*, *ibid.* 209; *Blackenhagen v. London Ass. Co.*, 1 Camp. 454; *O'Reilly v. Gonne*, 4 Camp. 249.

by such hasty escape from her port of loading, will not amount to a deviation.¹

In the United States several cases have been decided upon this principle; and, in all, the main point of inquiry seems to have been, whether the danger was so real and immediate as to justify the deviation.²

To join
convoy.

5. *Endeavour to join Convoy*.—It is no deviation for a ship, whether warranted to sail with convoy or not,³ to depart from the direct course of the voyage in order to seek convoy either at the usual place of rendezvous or elsewhere, provided such subsequent necessity do not arise out of her own prior default or delay; the only question in such case is whether the circumstances show to the satisfaction of the jury, that the captain, in so departing from the direct course of the voyage, acted fairly and *bonâ fide* according to the best of his judgment, and with no other view or motive but to meet with convoy, and thereby be enabled to reach the terminus of the voyage by the safest way.⁴

It is not a deviation for a ship, warranted or not to sail with convoy, if she has once sailed therewith and is afterwards driven back to port, to sail the second time without convoy.⁵

If it clearly appears that, in the common course of the voyage insured, the ship might have obtained convoy at a nearer port, and she is obliged by her instructions to call for it at a more distant port, this may amount to a deviation, as varying the risk.⁶

Succouring
distress.

6. *Succouring the Distressed*.—A doubt, dishonourable to

¹ O'Reilly v. Gonne, 4 Camp. 249.

² Olivier v. Maryland Ins. Co., 7 Cranch's S. C. Rep. 493; Whitney v. Haven, 13 Mass. Rep. 172; Reade v. Comm. Ins. Co., 3 Johnson's Rep. 352.

³ D'Aguilar v. Tobin, Holt's N. P. 185. So held also in the United States; Patrick v. Ludlow, 3 Johnson's Cases, 10; 1 Phillips, Ins. no. 1023.

⁴ Bond v. Gonzales, 2 Salk. 445; Gordon v. Morley, 2 Str. 1265; Campbell v. Bordieu, *ibid.* 1265; Bond v. Nutt, 2 Cowp. 601; Enderby v. Fletcher, 2 Park, Ins. 646; D'Aguilar v. Tobin, Holt's N. P. 185; S. C., 2 Marshall's Rep. 265.

⁵ Laing v. Glover, 5 Taunt. 49.

⁶ Heselton v. Allnutt, 1 M. & Sel. 45.

the jurisprudence of Christian communities, appears for some time to have prevailed both in this country and the United States, whether a departure from the direct course of the voyage for the purpose of saving the lives of men threatened with imminent danger of shipwreck or foundering, were or were not a deviation which would discharge the underwriters. It must, now, however, be taken as clear law, both on this and the other side of the Atlantic, that a deviation of this kind, sanctioned alike by the true interests of commerce and the clearest precepts of humanity, can in no instance be held to discharge the underwriters.¹

This liberty, however, has been expressly confined, in the United States, to those cases only in which the object of the deviation is the preservation of human life; and it has been held not to extend to the case of saving property.² I apprehend the law will be found the same in this country.

Since the last edition of this Work, the general question has been raised and argued, before the Court of Appeal in England, upon an action by a goods owner against the shipowner and carrier, whose vessel and her cargo, including the plaintiff's goods, were lost whilst the ship was performing a salvage service for another vessel and her cargo, but not such a service as necessarily included salvage of human life. The Court held the deviation to be no defence to the action, and gave judgment for the plaintiff.³

After a review of the English authorities, the Court were obliged to regard the case as of the first impression in our Courts. Upon the American authorities, the Court formulated the following propositions, as containing the existing

¹ In this country see the dictum of Lawrence, J., in *Lawrence v. Sydebotham*, 6 East, 54, and the judgments of Lord Stowell in *The Beaver*, 3 C. Rob. Ad. R. 292; and *The Jane*, 2 Hagg. Ad. Rep. 338, 345. In the United States, see the cases collected in 1 Phillips, Ins. no. 1027; 3 Kent's

Com. 313. See especially the judgment of Story, J., in the *Schooner Boston*, 1 Sumner's R. 328.

² See the cases referred to, 1 Phillips, Ins. no. 1028.

³ *Scaramanga v. Stamp*, 5 C. P. D. 295.

law of the United States on the question, and expressed their cordial concurrence with the law as thus laid down :—

“Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of *perils of the seas*. And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

“If, therefore, the lives on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.

“But where the preservation of life can only be effected through the concurrent saving of property, and the *bonâ fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.”¹

Irresistible
force of perils
not insured
against.

It is also now clearly established, that where the departure from the course of the voyage is the necessary effect of the immediate and irresistible operation of a peril not insured against, it will not be held to amount to a deviation, although the peril so operating be one not included among the ordinary risks, or be expressly excluded by the specific terms of the policy.

Thus, where a neutral ship, insured expressly “against sea risks and fire only,” was carried out of her course and detained six weeks by a British cruiser, this was held to be no deviation, though capture and seizure were perils not insured against; for the Court said, that in cases where the

¹ See per Sprague, J., in *Crocker v. Jackson*, Sprague, R. 141.

deviation was necessitated by superior force there was no ground for a distinction between a policy confined to particular risks, and a general policy embracing all risks.¹

It has been held in the United States, that, if the voyage is given up, and another entirely distinct one undertaken, on account of a peril not insured against, the risk thereupon ceases.² And from what fell from the Court in the case of *Delaney v. Stoddart*,³ it seems that those learned judges would have felt themselves constrained by the English law to come to a similar conclusion, had the facts warranted it.

¹ *Scott v. Thompson*, 1 B. & P. N. R. 181. See also per Kent, C. J., in *Robinson v. Marine Ins. Co.*, 2 Johnson, 89; 1 Phillips, Ins. no. 1025; 3 Kent's Com. 316.

² *Lee v. Gray*, 7 Mass. Rep. 349, and cited 1 Phillips, Ins. no. 1025.

³ 1 T. R. 22. The Judges were Lord Mansfield, Buller, Willes, and Ashurst, JJ.

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PART II.

OF CERTAIN MATTERS THAT RENDER THE CONTRACT OF
INSURANCE VOID OR UNAVAILABLE.

CHAPTER I.

MISREPRESENTATION.

General principle - - - 513 Representations defined - - 514 distinguished from warranties 516 why they avoid the policy - 519 by actual fraud - - - 520 materiality and falsehood 520 what are material - - - 530 what is compliance with - 535	}	in case of fraud - - - 535 of no fraud - - - 536 construction of - - - 538 to the first underwriter - - 544 effect of - - - 545 in respect of what - - 545 on whom - - - 547.
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In almost every instance in which a policy of sea insurance is effected, the underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and nature of the risk, and consequently the rate of premium, depend. It is to the assured, that all communications respecting the actual state of the property proposed for insurance, such as the time and place at which the goods are to be loaded, or the ship is to sail,—the force and equipment of the vessel, her then situation, and progress in her voyage, &c.,—are in the first instance addressed; he is thus the natural and sole depository of much of that information, a full and true communication of which is absolutely essential to the underwriter, in order that he may form a right judgment of the nature of the risk and the proper rate of premium.

Of misrepresentation or
allegatio falsi.

In consequence of this inequality in information existing between the parties to the proposed contract of insurance, and the complete dependence of the one upon the information to be supplied by the other, this contract is received in law as eminently a contract *uberrimæ fidei*, to be made, *i. e.*, in the utmost good faith; and, as a matter of public policy, its integrity and equitable character are guarded

by this implied condition precedent, that the contract is free from misrepresentation or concealment, whether the same be due to fraud, negligence, accident, or mistake. The effect of this is that the contract is void, *ipso facto*, whenever misrepresentation or concealment has entered into the making of it on the side of either of the parties to it, the assured or the insurer.¹

Representations: defined, described, and distinguished.

A representation, in the technical sense which the word bears in the law of insurance, may be defined to be:—A verbal or written statement made by the assured to the underwriter, at the time of the making of the contract, as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it.

A statement of facts may either be,—1, a positive affirmation by the assured, as of his own knowledge and upon his own responsibility, that the facts represented either do or will exist; or,—2, a mere declaration of his belief, or expectation that such facts do or will exist; or,—3, a mere communication of information which he has received from others respecting them.

It is to the first of these three classes of statement that the word representation, in its technical sense, is more properly applied; though, as we shall have occasion afterwards to observe, it may with certain limitations be extended also to the other two. For the sake of marking the distinction more clearly, we shall call those statements that positively affirm the actual, or future existence of material facts, *i.e.*, of facts tending to alter the judgment the underwriter would form of the risk,—*positive representations*; and denominate the two other classes respectively,—*representations of belief*,—and *representations of information*.

Of positive representations.

First,—a representation to take it by steps is “a verbal or written statement made by the assured or his agent to the

¹ Blackburn v. Vigors, 55 L. J. Willes, J., Anderson v. Pacific Fire (Q. B.) 347; 1 Phillips, 537; per & Mar. Ins. Co., L. R., 7 C. P. 65.

underwriter, at the time of the making of the contract." It may be either oral or in writing, and in point of actual practice, generally consists of either verbal communications made, or written instructions shown, by the broker to the underwriter at the time the risk is proposed to him or the policy is submitted for his subscription. Though made only verbally, every representation generally is, and ought always to be, entered by the broker in his book at the time, and carefully preserved as evidence of the real terms on which the contract was made.¹

The contract is regarded in most cases as made and complete when the slip is initialed by the underwriter. But until the 30 Vict. c. 23, we have seen² the slip could not be looked at by the Courts for any purpose whatever. Now, however, although the contract at this stage still lacks sundry additions before it becomes a valid contract of sea insurance, it yet may be given in evidence to show the intention of the parties; and consequently any representation made by one of the parties to the other, after their common consent has been ascertained and thus expressed, is of no effect on a policy made in accordance with the slip, although such policy be drawn up and executed after such a representation.

A broker proceeding to effect insurances on goods on board the vessel named in his instructions omitted to take his instructions with him, and finding, when with the underwriter, that in *Veritas* there were two vessels, a new one called the *Socrates*, and an old one called the *Socrate*, said he believed the goods were on board the *Socrates*. Two slips on the same goods were thereupon initialed, the one being on goods "by ship or ships," the other on goods by the *Socrates*. Afterwards the underwriter, at the request of the broker, initialed another slip on goods by the *Socrates*, and substituted that for the slip by *ship or ships*. When policies had been executed in accordance therewith, it was found that the

¹ *Pawson v. Watson*, 2 Cowp. 785, ² *Ante*, p. 259.
788.

goods were on board the old vessel called the *Socrate*. The policy answering to the original specific slip on goods by the *Socrates* was void by reason of this misrepresentation; but the other policy, answering to the slip which was originally on goods by *ship or ships*, was held binding notwithstanding, because the original contract of the underwriter being to insure goods by any ship, it consequently covered the goods on board the *Socrate*.¹

Distinguished
from a war-
ranty.

A representation, to be of any effect, must be made at the time of entering into the contract, and yet it is never, in terms, inserted in the policy. This, in fact, constitutes the main distinction in form between a representation and a warranty, viz., that a representation may be made either orally or in writing, but in neither case is introduced into the policy; whereas a warranty, not implied by law, must always be in writing and appear upon the face of the policy.²

No statement not actually written on the face of the policy itself will be construed as a warranty; not even though the paper on which the statement is written be wrapped up with the policy, or wafered to it at the time of subscription; such a paper writing may be a representation, it is no more.³

The same statement which, when made orally or in writing distinct from the policy by the broker to the underwriter, is construed as a positive representation, would, if written on the face of the policy, in almost all cases be in law and effect a warranty. Thus, where a broker, in effecting a policy on a ship, showed the underwriter, in order to induce him to take the risk, written instructions, in which it was stated with reference to the ship, "she mounts twelve guns and

¹ *Ionides v. Pacific Fire & Mar. Ins. Co.*, L. R., 6 Q. B. 674; 7 Q. B. 517. See also, *Cory v. Paton*, L. R., 7 Q. B. 304; *Lishman v. Northern Marit. Ins. Co.*, L. R., 8 C. P. 216; 10 C. P. 179.

² See the dicta of Lord Mansfield

in *Pawson v. Watson*, 2 Cowp. 785; *M'Dowall v. Fraser*, 1 Dougl. 260; and of Lord Abinger in *Cornfoote v. Fowke*, 6 M. & W. 378.

³ *Pawson v. Barnevelt*, 1 Dougl. 12, note 4; *Bize v. Fletcher*, *ibid.*

twenty men," this was construed as a positive representation ; but had these same words been written on the face of the policy they would have been held to be a warranty.¹

Wherever, therefore, the representation is a positive statement of the actual or eventual existence of some fact material to the risk, it is only distinguishable in form from a warranty by not being written on the face of the policy.

From this distinction in form arises a very important distinction in effect.² As a representation is not inserted on the face of the instrument, the assured is not tied down to the same rigid and literal compliance with its terms, as he is in the case of a warranty. Unless a warranty is true to the letter, and fulfilled with the most scrupulous exactness, the policy is avoided ; for in such cases there is a breach of an express stipulation, which the assured himself has inserted in the instrument as one of its terms. In the case of a representation, on the other hand, the very fact that the assured has declined to insert on the face of the policy the statement which he has yet represented to be true, shows that he does not intend to be bound down to this exact and rigorous accuracy, and accordingly a substantial compliance with the terms of a representation is all that is required.³

Warranty and representation differ in effect.

Thus, to take an illustration from the case already cited, had the words "she mounts twelve guns and twenty men" been written on the face of the policy, this would have been a warranty, and the policy been void had the ship carried one gun or one man less than the stipulated number. But, as these words were in fact only shown to the underwriter before subscribing the policy to inform him of the probable risk to be insured, and were not inserted in the policy, they were held to be a representation only, and the policy not void by reason merely of the ship's carrying a force of men and guns, not literally the same with that stated in the

¹ *Pawson v. Watson*, 1 Cowp. 785, 414.
788.

³ *Pawson v. Watson*, 2 Cowp. 785 ;

² See *Dent v. Smith*, L. R., 4 Q. B. *Christie v. Secretan*, 8 T. R. 192.

representation, though in point of strength, convenience, and for the purpose of resistance, even more favourable to the risk.¹

Materiality
of the repre-
sentation.

Further, it appears, by the definition, that a representation is a statement of the existence of some fact or state of facts "tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it." Facts, the statement of which may reasonably be presumed likely to have such an influence on the judgment of the underwriter are called "material facts:" a statement of such facts is called a material representation; and it is the falsehood of such a representation only that will have the effect of avoiding the policy.

Compared
with a
warranty in
respect of
materiality.

This constitutes a further distinction between a representation and an express warranty. In the case of a warranty all questions of the materiality or immateriality of the fact warranted are entirely excluded; the sole inquiry is, whether it be, or be not warranted that the fact is, or shall be so and so? If warranted, then, however unimportant the fact so warranted be to the risk, however little its existence or non-existence may have influenced the judgment of the underwriter as to the rate of premium, it must be absolutely true, or literally performed, as warranted, otherwise the policy is wholly void. The falsehood of a representation, in part, on the other hand, produces no effect on the policy unless the fact misrepresented be material.

Statements of belief or information would, if inserted in the policy, and false to the knowledge of the assured, have the effect of avoiding the policy on the ground of their being fraudulent. Thus, where the words "the vessel was expected to be loaded between the 13th and 20th of September," were inserted in the policy, this was construed as a representation

¹ *Pawson v. Watson*, 2 Cowp. 785; *Camp*. 151; *Nonnen v. Kettlewell*, see also *Von Tugeln v. Dubois*, 2 16 East, 176.

that the ship had not been loaded within the knowledge of the assured before the 13th of September; and as it turned out that he, in fact, knew she had been, the policy was held void on that account.¹

Moreover, the language of the policy may itself be such as to imply a representation, which will thus virtually form a part of the written instrument.

Representations implied in the terms of the policy.

Thus, where an insurance was effected on ship and cargo at and from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage,"—Lord Mansfield held, that these words plainly implied a representation that the vessel had loaded or would load at Genoa; and as it appeared she had not done so, but at Leghorn, and this being material, his Lordship considered the policy void for misrepresentation and concealment.²

Hodgson v. Richardson.

So, in case of an insurance on goods, where the words "to return five per cent. for convoy and arrival" were inserted in the policy, Lord Eldon was of opinion that these words clearly amounted to a representation that it was probable the vessel would sail with convoy, or, at all events, that there was a chance of her doing so; and, as it appeared that the assured knew, when the policy was effected, that the ship had actually sailed without convoy, his Lordship held the misrepresentation fraudulent, and the contract therefore void.³

Reid v. Harvey.

Formerly it appears to have been laid down in some cases, and assumed in others, that the ground upon which the misrepresentation of a material fact avoided the policy, was moral fraud, or a wilful intention on the part of the assured to deceive the underwriter.⁴ This ground, however, is long

The ground upon which false representation avoids the policy.

¹ Stewart v. Morrison, Millar on Ins. 39; and see some American decisions to the same effect, cited by Judge Duer, vol. ii. 721-738.

² Hodgson v. Richardson, 1 W.

Bl. 463; 1 Park, Ins. 412.

³ Reid v. Harvey, 4 Dow's Rep. 97.

⁴ See the dicta of Lord Mansfield in Pawson v. Watson, 2 Cowp. 785, and

since entirely abandoned, and the principle now established is, that misrepresentation from mistake, ignorance or accident, of any material fact, however innocently made, avoids the policy,¹ and this upon the principle in law already expressed on a previous page.²

Moral fraud avoids the policy, material or not.

Of course, if the purpose of the representation be fraudulent, that is, to deceive the underwriter, by inducing him to believe that which the assured, at the time, knows to be false,³ or does not know to be true,⁴ the policy is equally avoided, whether the false statement be material to the risk or not, and this on the broad ground of moral fraud.

The loss need not be connected with the misrepresentation.

It is not necessary, in order to avoid the policy on the ground of misrepresentation, that the loss should have arisen from a cause connected with the fact or circumstance misrepresented. In cases of moral fraud, no matter how trivial the circumstance, or how utterly unconnected with the cause of loss, the assured will be precluded from recovering on the policy. And the rule is the same, even in cases of misrepresentation from ignorance, accident, or mistake, if the fact were material to the risk, however foreign to the cause of loss. Thus, if the assured represent that the ship or goods are neutral property, and they are, in fact, enemy's property, he shall not recover even for a loss occasioned by shipwreck,

Bize v. Fletcher, 1 Dougl. 12; the dictum of Lord Tenterden in *Flinn v. Tobin*, Moody & Malk. 337, and the remarks of Judge Duer on Representation, 112, 113, note 3.

¹ The cases that establish this position are the following: *M'Dowell v. Fraser*, 1 Dougl. 260; *Fillis v. Brutton*, 1 Park, Ins. 414; *Fitzherbert v. Mather*, 1 T. R. 12; *Steel v. Lacy*, 3 Taunt. 285; *Feise v. Parkinson*, 4 Taunt. 640; *Dennistoun v. Lillie*, 3 Bligh, P. C. 202; per Lord Abinger in *Cornfoote v. Fowke*, 6 M. & W. 378; per Willes, J.: "There is no doubt that a material misrepresentation, though perfectly honest at the

time, made with the intent that it should be acted on by the insurer, and which has led to the policy being granted, will defeat the policy": *Anderson v. Pacific Fire & Marine Ins. Co.*, L. R., 7 C. P. 65.

² Ante, pp. 513, 514.

³ 1 Marshall, Ins. 452; 3 Kent, Com. 283; 2 Duer, Ins. 692; 1 Park, Ins. 405; and *Roberts v. Ponereau*, there cited; 3 Kent, Com. 283.

⁴ Per Maule, J., *Evans v. Edmonds*, 13 C. B. 777, 785; *Pawson v. Watson*, 2 Cowp. 785; see also *Fillis v. Brutton*, 1 Park, Ins. 414; 1 Phillips, Ins. no. 542.

whether the mis-statement were made through mistake, or from design to deceive.¹

If the policy be avoided by a mere misrepresentation without moral fraud, the assured is entitled to a return of premium;² not so, however, if the representation were false within his own knowledge, and made with the intention to deceive.³

Return of premium.

Positive representations have been subdivided into—1. Affirmative;—2. Promissory; the former averring the actual existence of the fact to which it relates; the latter, that such fact shall or will thereafter exist.

Classification of positive representations.

This distinction, however, is one more of form than substance; as, in fact, most positive representations, even when in terms affirmative, in effect are promissory. As, where it is represented that a vessel is neutral, or has a licence to trade, or has a certain armament, or a certain kind of cargo, the mere affirmation of these facts as existing at the time, is unimportant; it is the implied promise that, as far as depends on the assured, they shall be and continue unchanged throughout the duration of the risk, which alone gives value to the representation.

To take an instance in point. In the case of *Pawson v. Watson*, the representation made by the broker in effecting a policy on the ship was in these words:—"She mounts twelve guns and twenty men." Although affirmative in point of form, it is plain that this representation was promissory in its meaning; for, when the policy was effected, the ship, which, as appears by the report, did not sail for a month afterwards, had not a single gun or man on board; so that the representation, unless construed to refer to a future event, was false when made. The whole judgment of Lord Mansfield plainly shows that he took it to be, what

Representations, though affirmative in form, are promissory in effect.

¹ Per Holt, C. J., *Skinner's Rep.* 327; 1 *Marshall, Ins.* 452; 1 *Park, Ins.* 405; *Lynch v. Hamilton*, 3 *Taunt.* 36; *S. C.* (in error), *Lynch v.*

Dunsford, 14 *East*, 494.

² *Tyler v. Horne*, 1 *Park, Ins.* 455; *Chapman v. Fraser*, *ibid.* 456.

³ *Feise v. Parkinson*, 4 *Taunt.* 639.

undoubtedly it was, not a mere assertion of the actual force of the vessel at the time, but a stipulation that she would sail with the armament described on the voyage insured.¹ Had the representation just stated been thus expressed:—"She is to (or 'She will') mount twelve guns and twenty men," it would have been an instance of a representation promissory in terms as well as in effect.

Is there any
difference of
effect?

It is an important question, whether there is any difference between an affirmative representation and a promissory representation, as to the ground on which, if false, they will avoid the policy? In other words, whether the positive misrepresentation of a future fact, material to the risks, will just as much avoid the policy, in the absence of moral fraud, as the positive misrepresentation of a past or existing fact, equally material?

Flinn v.
Tobin.

The distinction seems first to have been taken in *Flinn v. Tobin*, before Lord Tenterden, at *Nisi Prius*. That case was this:—To induce an underwriter to take a risk on a ship about to sail with a cargo of rock salt, the broker falsely, but not fraudulently, represented that "the ship would only take fifty or sixty tons of rock salt, which would put her in light ballast trim." The ship sailed the day after the policy was signed, with 160 tons of rock salt on board, being a full and very heavy cargo. The counsel for the plaintiff, though they admitted that the misrepresentation of past facts might, if false, avoid the policy, even without actual fraud, yet contended that the misrepresentation of facts which are hereafter to happen, being properly a matter of stipulation and contract, could not have that effect, unless inserted in the policy.² It appears by a subsequent case involving the same facts, that his Lordship, in terms, took the distinction in question, and advised the jury to find for the defendant if they thought that a material misrepresentation was made by the broker as to the quantity of rock salt actually on

Flinn v.
Headlam.

¹ See 2 Duer, 766. I have adopted the language of this able writer almost without a change.

² *Flinn v. Tobin*, 1 Mood. & Malk. 367.

board, but to find for the plaintiff if they thought that the representation was respecting the cargo expected to be shipped.¹

But this distinction, even when confined to the sole case of promissory representations, is totally irreconcilable with principle or with express authorities of the greatest weight. The principle on which the false affirmation of the actual or past existence of a material fact avoids the contract in cases where there is no moral fraud, is, that the underwriter only engaged to be liable upon the faith that such fact existed; so that the falsity of the statement is the breach of a condition precedent that the contract should be free from misrepresentation.

On principle there is no ground for the distinction, and it is also quite irreconcilable with authority.² Instead of citing all the cases to show that the doctrine of the Courts has been, that such representation, although made in good faith, must be substantially complied with, in order to sustain the policy, a single decision to this effect in the House of Lords whilst it was presided over by Lord Eldon, may suffice.

A policy on ship and goods from Nassau (New Providence) to the Clyde (in Scotland), was effected on the 18th June, 1814. On that occasion the broker showed the underwriters a letter, dated the 2nd April, and received by the owners the day before the policy was effected, in which it was stated, "*The Brilliant*," the ship insured, "will sail on the 1st of May." In point of fact, it turned out that the ship had sailed on the 20th April, and on the 11th of May had been captured by an American privateer. These facts were wholly unknown to the parties by whom the representation was made; yet it was held, that the policy was avoided by the

Dennistoun v. Lillie.

¹ *Flinn v. Headlam*, 9 B. & Cr. 694.

² See *Steel v. Lacy*, 3 Taunt. 285; *Feise v. Parkinson*, 4 Taunt. 639; *Edwards v. Footner*, 1 Camp. 530;

Dennistoun v. Lillie, 3 Bligh, P. C. 102. See also the American cases to the same effect collected by Judge Duer, *Ins.*, vol. ii. 741-743, and 749-769.

misrepresentation. "There is a difference," said Lord Eldon, "between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk."¹

This case, then, is an explicit authority for the position, that a positive promissory representation of a material fact, will, if false, avoid the policy though no moral fraud can be alleged.

Edwards v.
Footner.

Accordingly, where a representation was made some time before the ship sailed, to the effect that she "was to sail" with convoy and a certain armament, so that the representation was both promissory in its terms, and related to an actually future fact, Lord Ellenborough held, that as it had not been substantially complied with, it avoided the policy, though made without moral fraud.²

Upon the authority of previous cases, then, the distinction assumed by Lord Tenterden appears to be untenable; and, in point of fact, it seems on further reflection to have been abandoned by himself.³

It may, therefore, safely be laid down, as the conclusion to be derived from all the authorities, that the positive representation of a future fact material to the risks, will, if false, avoid the policy, though it may not be morally fraudulent.

Representations of belief or expectation.

Second,—There is a great distinction to be drawn between such positive promissory representations, and representations of belief or expectation which we have placed in a distinct class and come now in the course of this inquiry to consider. The former are positive engagements that certain material facts do, or will, exist; the latter, merely expressions of an expectation or belief that they either do, or will, exist. The former involve a stipulation, that, unless facts take

¹ Dennistoun v. Lillie, 3 Bligh's 530.
P. C. 202.

³ Flinn v. Headlam, 9 B. & Cr.

² Edwards v. Footner, 1 Camp. 693, 696.

place substantially corresponding with those specified, the underwriter shall not be liable on the policy; the latter imply no stipulation of the kind, and their falsification accordingly can only avoid the policy in case of moral fraud.

A moment's consideration will show that this distinction is well founded. If a man assures me positively that certain events, over which he has a control, and without which I should decline entering into a contract with him, shall take place in a given way, and I enter into the contract on the faith of that positive assurance, it seems clear that such statement must substantially be made good, in order to make me liable on such contract. If, however, he merely tells me that he believes or expects that such events will happen in a certain way, and I choose to enter into the contract upon the mere chance of such belief or expectation turning out well founded, I have no right to be released from my contract on its proving fallacious; for its failure was a contingency which I ought to have contemplated on entering into the contract. If, indeed, I can show that, with a design to deceive me, he represented himself as expecting or believing that which he knew at the time to be impossible or untrue, I shall be released from my contract on the special ground of this his moral fraud, and on the general ground that his fraud is a breach of a condition of the contract.

And the result would appear to be the same if, with the intention to deceive me, he stated his belief or expectation of that, with regard to the possibility or truth of which he knows nothing, either one way or the other.¹

Thus, if, with the intention to deceive, the owner of a ship states to the underwriter that he believes the ship to be neutral, knowing nothing on the subject, and having no reason to believe either way, the better opinion would seem to be, that this representation, if false, would avoid the policy.²

¹ Per Maule, J., *Evans v. Edmonds*, 13 C. B. 777, 785.

² Lord Mansfield in *Pawson v. Watson*, 2 Cowp. 787, laid down the

It has this effect, however, only when made with the intention to deceive.

Barber v.
Fletcher.

Thus, where a broker employed to effect a policy on certain ships engaged in the African trade, represented that they were "expected to leave the coast of Africa in November or December," when, in fact, they had all left in May: this, though material to the risk, yet, not being fraudulently made, was held not to be a representation, but a mere expectation, into the grounds of which the underwriter ought to have inquired before he relied on it.¹

A statement
is to be con-
strued with
reference to
the parties
and the cir-
cumstances.

When it is evident from the position of the parties and the whole circumstances of the case, that a statement, though in terms a direct and positive assertion, must, in fact, be regarded as a mere expression of expectation or belief, or opinion, it will be so construed.

If, for instance, the owner of goods were to make a statement as to the time of the ship's sailing, without knowledge either the one way or the other, such statement ought to be looked upon as totally immaterial, coming from such a quarter.² And this principle has been extended to cases in which the statement is, on the face of it, a positive promissory representation or explicit engagement for the existence of future facts, where made, in the absence of fraud, by parties who have no interest in the subject, or control over the event, to which the statement refers.

Bowden v.
Vaughan.

Thus, where a broker, employed to effect a policy on goods, for a party who had no interest in the ship, represented that "the ship," which was then at Lisbon, "was to sail in a few days," and the ship did not, in fact, sail for a month, Lord Ellenborough held, that this statement, though material to the risk, but made by the owner of the goods,

contrary; but the observations of Maule, J., *ubi supra*, of Mr. Marshall (Ins. p. 453), and of Judge Duer (Ins. vol. ii. 710, 711) seem unanswerable in favour of the other view.

¹ Barber v. Fletcher, 1 Dougl. 306. It appears from the report that there

was no allegation of moral fraud. See also the remarks made on this case by Bayley, J., in *Bridges v. Hunter*, 1 M. & Sel. 19.

² Duer on Representations, 95, 96, 97.

who had no control over the time of the ship's sailing, must be regarded merely as the expression of a probable expectation, which, as it appeared to have been made *bonâ fide*, could not avoid the policy.¹

A broker employed to procure an insurance on a ship, for a voyage "from St. Petersburg or Cronstadt to London," in order to induce the underwriter to take the insurance as a summer risk, told him, on the 13th of June, just before the policy was effected, "the ship had sailed some time (*i. e.*, from London), and must now be at Gottenburg. There is a cargo ready for her (*i. e.*, at Cronstadt), and she is sure to be an early ship." The ship, in fact, did happen to be at Gottenburg when this statement was made, but at Cronstadt found no cargo ready for her; and in consequence of the delay thus caused, did not begin her voyage from Cronstadt to London till after the winter risk had begun. Lord Ellenborough held that this did not avoid the policy, as the statement must have been understood by the underwriters to mean nothing more than the expression of a probable belief that a cargo would be ready for the ship at Cronstadt, so that she might be expected to be an early ship.²

Hubbard v. Glover.

Where a broker, employed to effect an insurance on a ship "at and from Messina to her port or ports of discharge in the Channel," stated to the underwriter at the time of effecting the policy, "that the ship was then (28th June) either near Messina, or at Messina, or on her homeward voyage;" and it turned out in fact that the ship, although she sailed from London a fortnight before this statement was made, yet had not sailed from Falmouth till two days after it (*i. e.*, on 30th June)—Gibbs, C. J., held at the trial, and the Court of Common Pleas confirmed his decision, that this was not a positive representation, but merely the expression of an opinion formed by the broker, from knowing the time at which the ship had sailed from London;

Brine v. Featherstone.

¹ Bowden v. Vaughan, 10 East, 415.

² Hubbard v. Glover, 3 Camp. 313.

and, therefore, although it might have bound the assured to a substantial compliance, if he had stated it positively as a fact, yet, as he merely stated the ship to be in one of three situations, and did not allege specifically in which, that the very form of the statement itself showed that it was merely to be taken as the expression of a calculation, which, though erroneous, could not avoid the policy in the absence of fraud.¹

At the time of effecting a policy on the freight of the *Clarendon* "from Belize to Rendez-vous Point, thence back to Belize, and thence to London," Rendez-vous Point being unknown to either of the parties, the master's letter was shown to the underwriter containing this passage:—"It is considered by the pilot here as a good and safe anchorage, and well-sheltered. I have been out and seen the place, and consider it quite safe." It was proved on the trial that Rendez-vous Point was a dangerous place for a vessel to anchor during the hurricane months; but the jury found that the pilot and master considered it was not dangerous.

Willes, J., when the case came before the Court in banc, said: "There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted on by the insurer, and which has led to the policy being granted, will defeat the policy. The question, however, is, whether the passage in question amounts to an absolute statement of fact, or only to a statement of opinion. If the latter, it may be that, if it was an opinion which the writer of the letter really did not entertain—a conclusion which the jury would easily have arrived at, if they thought no person could honestly have entertained such a belief, I think the assured would be bound. But the jury found that it was an opinion honestly formed. I am of opinion the words do not amount to an absolute statement of a fact. The effect of them is this. It was considered by the pilot a safe place, and from information

¹ *Brine v. Featherstone*, 4 Taunt. 867.

received of the pilot and my own inspection, I consider it quite safe. Fraud being out of the question, I think that is no misrepresentation.”¹

If, however, the form of statement be positive, and there is nothing in the circumstances to show that it was not so intended, then, although the error consist merely of a wrong inference from facts truly communicated, the positive nature of the statement will bind the assured to a substantial compliance, and its falsehood, in fact, will avoid the policy.

Thus, a broker, having been informed that a ship was seen in the Delaware five days after she had sailed from New York, understood this to mean, as by the usage of mercantile men it well might, five days after she had sailed from Sandy Hook, which he knew to have been on the 6th of December, and he consequently stated it as a positive fact that the ship “was seen safe in the Delaware on the 11th of December;” this was held a representation which must be substantially borne out by actual facts, notwithstanding it was shown to be a mere miscalculation made on the assumption that the ship’s sailing intended was from Sandy Hook, and not, as it was in fact, from New York quay, which was some days earlier.²

M'Dowall v. Fraser.

The ground of distinction between these two classes of cases, is, that from the one mode of statement the underwriter must necessarily have inferred that the assured did not mean to affirm the fact positively; and from the other he must equally have inferred that he did. In the former the underwriter ought not, as a cautious man, to take the risk, without inquiring into the grounds of such expectation, belief, or opinion; otherwise, the law presumes that he relies and acts exclusively on his own judgment, and has no right to complain of the consequences.

Ground of distinction between these cases.

¹ *Anderson v. Pacific Fire & Mar. Ins. Co.*, L. R., 7 C. P. 65. This extract from the judgment has been slightly abbreviated.

² *M'Dowall v. Fraser*, 1 Dougl. 260.

Third class of representations.

Third,—A third class of representations consists of those in which the assured neither states positively the actual or future existence of a fact, nor his belief or expectation of its existence; but either, 1. qualifies his statement by adding that it is made on the information of others; or, 2. merely submits the information in its whole extent to the underwriters, leaving them to draw their own conclusions from it.¹

In these cases the assured is bound, not to any substantial compliance with the statement made, but, only to show that such statement corresponded with the information he really received; in other words, he is not answerable for the truth of the facts, but only for the truth with which he stated the information received.

What representations are material.

As we have already seen, when no moral fraud can be imputed, a representation, although false, will not avoid the policy unless it be material. It becomes important, therefore, to inquire what it is that makes a representation material.

Materiality.

Every representation is to be presumed material which is of such a nature as would likely induce a fair and reasonable underwriter to take the risk or to take it at a lower premium than he otherwise would. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter.²

Fitzherbert v. Mather.

Thomas, a corn-factor at Hartland (in Devonshire), shipped by order a cargo of oats on the 16th of September to a consignee at Portsmouth, on account of the assured. The same day he wrote to an agent of the assured at Portsmouth, stating that he had that morning shipped the oats, that the ship had sailed immediately, but that he was afraid the

¹ 2 Duer, Ins. 707.

² See 1 Marsh. Ins. 449; 1 Phillips,

Ins. nos. 524, 525, 526; Duer on Representations, 71.

wind was coming from the westward, and would force her back; he also, the same day, wrote to the same effect to another agent of the assured in London, directing him to effect an insurance, and adding these words: "I wish the whole were safe in hand. The weather appears stormy." These letters by the course of post did not leave Hartland till 1 P.M. on the 17th, early on the morning of which day Thomas knew of the loss of the ship, which had been driven back by the wind and wrecked on the night of the 16th off Hartland pier. He sent no further information. The London agent, who, on the morning of the 26th received the letter which left Hartland on the 17th, and also an order from the assured to procure an insurance, submitted these letters to the underwriter as his instructions, and upon them procured a policy to be effected on the oats, "lost or not lost, from Hartland to Portsmouth."

The Court held that the policy was void on the ground of misrepresentation. The assured himself was innocent, yet as he had built his information on that of his agent (Thomas), and the agent had been guilty of misrepresentation, the assured himself ought to suffer for it. "This policy," said Lord Mansfield, "was effected by misrepresentation, because the underwriter was warranted on the information of the agent (*i.e.*, Thomas) to take for granted that on the 17th of September, at 1 o'clock" (the post-time at Hartland), "the ship was safe; for the agent gave an account of the ship being loaded, but said nothing at all of what had happened to her."¹

So where merchants, residing in this country, had received from their correspondents abroad several letters relating to a risk, on which they wished to effect an insurance, in one of which it was stated positively, but, as it turned out, falsely, that the ship "will sail" on a given day, and the under-

Dennistoun v. Lillie.

¹ *Fitzherbert v. Mather*, 1 T. Rep. 12, 15, 16;—per Buller, J., "According to plaintiff's letter the insurance was not to be made till Thomas's letter arrived; it was therefore the foundation of the insurance."

writers subscribed the policy after inspecting all these letters which were communicated to them by the merchants as their instructions, it was held that the assured, though innocent themselves, were responsible for this misrepresentation of their correspondents.¹

Sibbald v.
Hill.

Where a London merchant induced an insurer at Leith to underwrite insurances on two of his ships engaged in the whale fishery at eight guineas per cent., by representing that such was the highest premium which he had given for insurances on the same risk in London, whereas to the London underwriters he had paid premiums of fifteen, eighteen, and even twenty-five guineas per cent., the Leith underwriter, on this appearing, refused to pay the loss. The Court of Session in Scotland decided against him, on the ground that "the statement as to the premium was not a misrepresentation as to any of the circumstances attending the situation or condition of the ship, or nature of the voyage, which could affect the nature of the risk. The House of Lords, however, on the motion of Lord Eldon, reversed the judgment on the general principle, "that every misrepresentation is fatal to a contract, which is made under such circumstances and in such a way, as to gain the confidence of the other party, and induce him to act when otherwise he would not."²

How far the following case is misreported, or if truly presented, whether it can be justified on any principle recognised in insurance law, is exceedingly to be doubted.

Flinn v.
Headlam.

It was stated as a fact "that the vessel would only take in fifty or sixty tons of rock salt, which would be no more than ballast trim," and the materiality of this statement was admitted on all hands; but as at the same time a certificate of the ship's fitness to proceed on her voyage with a cargo of rock salt was shown to the underwriters, Lord Tenterden told the jury to consider whether the underwriter was guided by the certificate or the representation; and the jury, under

¹ Dennistoun v. Lillie, 3 Bligh's P. C. 202.

² Sibbald v. Hill, 2 Dow's P. C. 263.

this direction, having found for the assured, saying they thought the representation, under the circumstances, not material, the Court, on motion for a new trial, refused to disturb the verdict.¹

There are facts, however, that have so plain and direct a bearing on the estimate of the risk, that a misrepresentation as to them or any of them will, in all cases, avoid the policy; unless the assured can show, to the satisfaction of the jury, that the judgment of the underwriter was not, under the circumstances, influenced by the misrepresentation.

When the presumption of materiality is against the assured.

Thus, positive representations of the day on which the ship has sailed, or will sail,² or on which she was last seen in safety,³ of the kind of armament she is to be fitted out with, the number of men with which she is to be manned,⁴ and the nature of the cargo she is to carry,⁵—being each of them a statement material to the risk, and of a nature to affect the underwriter's estimate of it, will, if false, avoid the policy, unless the assured can show conclusively that the underwriter was not in fact influenced by it. In the absence of such proof, the presumption is to the contrary, and against the policy.

If made in reply to inquiries of the underwriter touching points material to the risk, the representation avoids the policy if not substantially true, and this, even though it relate to facts which the assured is not bound to disclose, as the age, structure, or condition of the vessel, and generally all those points which are included in the implied warranty of seaworthiness,—facts themselves material, and any

Answers to inquiries of underwriter.

¹ *Flinn v. Headlam*, 9 B. & Cr. 690. Mr. Phillips is unable to find a legal principle, or a statement of fact in the case, which would support this result, no. 681.

² *Anderson v. Thornton*, 8 Exch. 425; *Fillis v. Brutton*, 1 Park on Ins., 414; *Dennistoun v. Lillie*, 3 Bligh's

P. C. 202; *Arnot v. Stewart*, 5 Dow, 274.

³ *M'Dowall v. Fraser*, 1 Dougl. 260.

⁴ *Pawson v. Watson*, 2 Cowp. 785; *Edwards v. Footner*, 1 Camp. 530.

⁵ *Flinn v. Headlam*, 9 B. & Cr. 693.

representation in respect of which will be presumed to have influenced the mind of the underwriter.¹

Mackintosh v. Marshall.

On the same principle, a positive misrepresentation of a fact material to the risk, the truth of which might be ascertained from Lloyd's List, will avoid the policy, unless distinct proof can be adduced that the underwriter actually did inspect the lists, the presumption being that he relied upon such representation, and not upon the lists.²

Rate of premium as a test,

Where the facts represented are not so obviously material to the risk, a presumption as to the materiality of the representation may be raised by the rate of premium at which the risk has been taken; *e. g.*, if the premium is much lower than is required in the absence of any such representation, there is occasion and room for the presumption that the representation induced the underwriter to take it at the lower premium. As naturally would the presumption be the other way, if the premium were higher than usual, or at least not lower.³

a question exclusively for the jury.

The materiality of a representation is a question which falls exclusively within the province of a jury.⁴ But whether the jury, in forming their judgment on this point, are to be left to draw their conclusions simply from the facts, or to be aided with the opinions of witnesses of experience and skill, such as underwriters, insurance brokers and merchants, is, as we have already had occasion to observe, a point on which the English authorities are not agreed.⁵

¹ Per Lord Ellenborough, *Haywood v. Rodgers*, 4 East, 590, 596, 597; 1 Phillips, Ins. no. 542.

² *Mackintosh v. Marshall*, 11 M. & W. 116. There is an opinion not in accord with this decision attributed to Erle, C. J., *Foley v. Tabor*, 2 F. & F. 662.

³ See as to presumptions from the rate of premium, *Court v. Martineau*,

3 Dougl. 161; *Bridges v. Hunter*, 1 M. & Sel. 18, 19.

⁴ *M'Dowall v. Fraser*, 1 Dougl. 260; *Shirley v. Wilkinson*, 1 Dougl. 306, n.; *Willes v. Glover*, 1 B. & P. N. R. 14; *Mackintosh v. Marshall*, 11 M. & W. 116, 121; *Duer on Representations*, 78, 196, note xxii. and the cases there cited.

⁵ *Ante*, p. 181.

The cases in which the point has arisen have been almost all cases of concealment; but the principles on which they have been decided are quite as applicable to the subject of representation, and a reference to them is therefore subjoined.¹

That which avoids the policy is the falsity of a material representation. What representations are to be regarded as material, we have been considering. We proceed now to inquire when it is that a representation will be regarded as falsified by fact.

What amounts to a substantial compliance with a representation.

A representation may in general terms be said to be falsified when the facts to which it relates turn out not to correspond with the statements or stipulations it contains.

If the representation be made with intent to deceive, any want of correspondence between the facts as they occur and the facts as stated, however trivial, or however immaterial to the nature of the risk, will avoid the policy on the ground of moral fraud.

In case of moral fraud.

Thus, to take a case put by Judge Duer, suppose the owner of a vessel insured "at and from" a foreign port has intelligence of her sailing, and also that a certain number of her crew had died since the commencement of the voyage, if he states truly the fact and time of her sailing, but yet, fearing the effect of the whole truth on the mind of the underwriter, represents the number of deaths to be fewer than he knows to have occurred, then, although the remaining crew may still be abundantly competent to perform the voyage, and the misrepresentation consequently immaterial

¹ The cases against the admissibility of the evidence are *Carter v. Boehm*, 3 Burr. 1905; *Durrell v. Bederley*, Holt's N. P. 283; *Campbell v. Rickards*, 5 B. & Ad. 840;—for the admissibility of the evidence, directly, *Chaurand v. Angerstein*,

Peake's N. P. 43; *Berthon v. Loughman*, 2 Stark. 229; *Rickards v. Murdock*, 10 B. & Cr. 527; indirectly, *Haywood v. Rodgers*, 4 East, 590; *Littledale v. Dixon*, 1 B. & P. N. R. 151; *Chapman v. Walton*, 10 Bing. 57.

to the risk, yet this falsity of statement, being intentional, will avoid the policy.¹

In the absence of moral fraud.

In cases, however, where there is no moral fraud, the rule is different. It is the result of all the cases, that although a warranty, being in terms written on the face of the policy, will avoid it unless fulfilled to the letter, yet a representation, forming no part of the policy, will, in the absence of moral fraud, be satisfied by a substantial compliance, and will not be deemed falsified unless departed from in some material point. In the words of Lord Mansfield, "A representation may be equitably and substantially answered, but a warranty must be strictly complied with."²

Pawson v. Watson.

Thus, to take an illustration from a case already more than once referred to, where the representation made as to the ship was,—“she mounts twelve guns and twenty men,”—and it turned out that the ship, in fact, had on board only nine carriage-guns and sixteen men, yet, as she had also on board, in addition to the above, six swivels and nine boys, and as it was satisfactorily proved that with this force she was stronger than she would have been with twelve carriage-guns and twenty men, Lord Mansfield held, that there had been a substantial compliance with the representation, *i. e.*, no such falsification of it as would avoid the policy.³ Had these same words been inserted in the policy as a warranty, the policy would have been avoided by her carrying one man or one gun less than the exact number specified.

A statement that the vessel had been last metalled in 1867, was held to be substantially true where the bottom had been then overhauled and new metal put on where required.⁴ A ship which is represented to be neutral, and which in fact belongs to a neutral state, and is documented and navigated according to the laws of that state, does not lose the protection of the policy through being condemned by a Court of a

¹ 2 Duer, Ins. 692.

² De Hahn v. Hartley, 1 T. R. 345.

³ Pawson v. Watson, 2 Cowp. 785.

⁴ Alexander v. Campbell, coram L.J.J., 41 L. J. (Chanc.) 478.

belligerent for not conforming to an ordinance which is not binding on the state to which she belongs.¹

Wherever there is no intention to deceive, the falsity of the representation, in order to avoid the policy, must produce such a variation of the risk represented to the underwriter, as to lead to the reasonable conclusion, that had the truth been known, he would either not have underwritten the policy at all, or would have asked a higher premium for so doing. If, upon the whole of the evidence, it appears doubtful whether such would be the effect of the non-correspondence of the facts with the statement, the assured is entitled to the benefit of the doubt, and the policy should be enforced.

Reason for this.

Under this rule, different degrees of strictness in compliance may well be required in case of different representations. For instance, positive representations with regard to the time of the ship's sailing, where that fact is material to the risk, must be complied with almost as literally as express warranties to the same effect. The smallest difference in such cases is often very material; as in the case mentioned by Lord Ellenborough of two vessels, one of which sailed to Nova Scotia and back before the other had made any material progress in her voyage, only from the advantage of having a few hours' start.²

Degrees of compliance.

Hence where, in case of a policy "at and from," the broker's instructions stated the ship to be ready to sail on the 24th of the month, and the broker represented the ship to be in port, when in fact she had sailed on the 23rd, this was held such a falsity as to avoid the policy.³ So where the representation was that the ship "would sail in the month of October," which, by the usage of trade, was shown

¹ *Von Tugeln v. Dubois*, 2 Camp. 151; see also *Nonnen v. Kettlewell*, 16 East, 176, in which the same point was determined on a representation by the assured that his property was neutral, but who refused to warrant it as such. See also *Christian v. Dit-*

chell, Peake's Additional Cases, 141, as to what will satisfy a representation that ship is to sail with convoy.

² In *Kirby v. Smith*, 1 B. & Ald. 672, 674.

³ *Fillis v. Brutton*, 1 Park, Ins. 414; 1 Marshall, Ins. 462, 465.

to mean "between the 25th of October and the 1st or 2nd of November," and the ship in fact sailed on the 11th of October, this was held fatal to the policy.¹ So where the broker, proceeding on a false computation, founded on a misconception of intelligence truly communicated to him, stated to the underwriter that the ship "was seen safe in the Delaware on the 11th," whereas, in fact, she had been taken on the 9th, this was held such a misrepresentation as to avoid the policy.²

Where, however, it appears reasonable to conclude, from the whole circumstances of the case, that the failure to comply with the strict terms of the representation has not substantially altered the nature of the risk, as described in the policy, such non-compliance will not discharge the underwriter's contract.³

A waiver as to the representation.

Moreover, if the insurer underwrite a policy inconsistent in terms with a representation made to him before doing so, he waives his right to require a substantial compliance with the representation, or to insist on a failure therein as avoiding the policy.⁴

Representation withdrawn before policy signed.

A representation may be withdrawn at any time before the policy is actually signed, either expressly by the assured declaring to the underwriters that he was mistaken, or will not hold himself bound to compliance with it, or else impliedly by a subsequent qualifying or controlling statement.⁵

Construction of representations.

In the construction of representations, the primary rule is to take the words in their plain and obvious meaning, and in

¹ *Chauraud v. Angerstein*, Peake's N. P. 4.

² *McDowall v. Fraser*, 1 Dougl. 260. And see the principle of the above cases further illustrated in that of *Arnot v. Stewart*, 5 Dow, 274.

³ *Bize v. Fletcher*, 1 Dougl. 284.

⁴ *Ibid.* 1 Dougl. 284, 288.

⁵ *Carter v. Boehm*, 3 Burr. 1905; *Dawson v. Atty*, 7 East, 366; *Edwards v. Footner*, 1 Camp. 530.

that sense in which it is most reasonable to conclude that they were understood by the underwriter.¹

Words in
their plain
and obvious
meaning.

Thus, it has been determined in the United States, in the case of a policy effected at Boston on a New York ship, that a representation on the part of the assured, residing at New York, that she was "coppered," must have been understood by the Boston underwriters to have been used, and was satisfied in the sense which it bears at New York.²

This rule comprehends in the representation whatever would reasonably and necessarily be inferred by mercantile men from the language under the circumstances in which it was employed.

Thus, where the assured knowing that the ship had sailed from the coast of Africa in the course of the 2nd of October, but, without a word to that effect, simply stated to the underwriter, "that the ship was on the coast the 2nd of October," this representation was construed as meaning that the last intelligence left the ship on the coast, and that no advice of her actual sailing had been received; and the jury, under the direction of Lord Mansfield, found there was misrepresentation and concealment which avoided the policy.³

Ratliffe v.
Shoolbred.

So, where the owner of a ship, in order to induce the underwriters to take an insurance on her "from Elsinore to Hull," stated to them that the ship "was all well at Elsinore on the 26th of July," "the natural conclusion would be," as Bayley, J., said, "that she was left there well at the time;" and therefore, as it appeared that she had sailed from Elsinore, to the owner's knowledge, on the 26th of July, six hours before the vessel on board which he himself had left that port, the Court held the policy void for misrepresentation and concealment.⁴

Kirby v.
Smith.

If the language of the representation be designedly

If ambiguous
by design.

¹ See *Sibbald v. Hill*, 2 Dow, 263.

³ *Ratliffe v. Shoolbred*, 1 Park, Ins. 413.

² *Hazard v. New England Marine Ins. Co.*, 8 Peter's Sup. C. R. 557; 1 Phillips, no. 566.

⁴ *Kirby v. Smith*, 1 B. & Ald. 672.

ambiguous, the underwriter, if deceived, would be discharged from all liability upon the policy on the ground of fraud.

If obviously
ambiguous
without
fraud.

If, in the absence of fraudulent design, there be such obvious ambiguity as might have suggested doubts to the underwriter about the meaning, and have impelled him to seek an explanation from the assured, and he omit to do so, he will not be permitted afterwards to avail himself of the representation not being true in the sense in which he understood it. Especially will this be so where in all probability it appears not to have been meant as a positive representation; or where it is suggested on the face of it, by reference, for instance, to other sources of information, that it is not to be taken as a complete statement of the case.¹

Freeland v.
Glover.

Thus, where a policy was effected on a ship "lost or not lost, at and from twenty-four hours after her arrival at her first place of trade on the coast of Africa, during her stay and trade on the coast, and at and from thence to Liverpool," and the assured had submitted to the underwriters, before the subscription of this policy, a letter from the master containing the latest intelligence as to the then state and condition of the ship (which appeared to have been then for some time on the coast of Africa), but referring to a former letter from the master on the same subject, which was not exhibited; the Court held that the mention of the former letter, in the second, ought to have put the underwriters upon inquiry as to the nature of the first communication, but that they were not entitled to complain of the suppression of the first letter as a concealment.²

Explained
by usage.

The terms in which a representation is expressed, equally with those of the policy itself, must, if technical, or of peculiar mercantile import, be construed with reference to the usage of trade. Thus, where it was represented that a

¹ Brine v. Featherstone, 4 Taunt. 462.
867; Freeland v. Glover, 7 East,

² Freeland v. Glover, 7 East, 462.

ship was to sail "in the month of October," evidence was admitted to show that this, by the usage of trade, meant that she was to sail "between the 25th of October and the 1st or 2nd of November;" and as she actually did sail on the 11th of October, this was held a failure to comply with the representation and rendered the contract void.¹

Chaurand v. Angerstein.

It has already been observed, says Mr. Arnould in this place, that evidence of a positive representation can in no case be admitted to contradict the express terms of the written policy; but, he continues, there seems little doubt that it may be admitted to supersede a usage of trade inconsistent with it, the terms of which are not expressed in the policy.²

Parol evidence inadmissible to exclude trade usage from the policy.

Blackburn, J., after argument and time taken to consider, has decided the contrary in respect of custom and usage,³ and when the same question incidentally came before him in respect of an implied warranty he expressed a very strong opinion to the same effect, stating that there is no decision in our books from which any support can be derived for such an opinion as that here expressed by Mr. Arnould, either in respect of a general usage, or a warranty implied by law.⁴ This result of the learned Judge's research is not surprising, if, as I think it may be shown, the established usages of a particular trade, like the general customs of merchants, stand in relation to contracts upon such matters exactly as do the laws of the land. The laws and the usages alike form part of the contract unless they are expressly excluded by the same kind of evidence that is required to sustain the contract itself.⁵ If I am right in assigning to trade usage

¹ *Chaurand v. Angerstein*, Peake's N. P. 43.

² Referring to *Urquhart v. Bernard*, 1 Taunt. 450; 2 Dewar, Ins. 670-672.

³ *Fawkes v. Lamb*, 31 L. J. (Q. B., Bail Court), 98.

⁴ *Burges v. Wickham*, 33 L. J.

(Q. B.) 17; 3 B. & S. 669, 696.

⁵ This is the first proposition in the course of the argument which is overlooked by those (like the American text writers) that maintain the contrary opinion. A general usage is certain. It is in the knowledge of hundreds who also act upon it in the

within its own sphere not only the same all-pervading intimacy with contracts, but also the same high obligatory force as appertains to the law of the land over a much wider dominion, then Mr. Arnould is inconsistent with himself and not justified in suggesting the admissibility of representations to contradict such usages after confessing that they are inadmissible to contradict the express terms of the written policy with which such usages are co-ordinate in evidence and blended in effect.

The same opinion as is here expressed by Mr. Arnould, is maintained by the American text writers, Phillips, Parsons, and Duer, who all hold, but without any judicial authority in support of it, that a general usage may be excluded from the policy by oral evidence of a representation inconsistent with it.¹ Duer declines to adopt the same opinion respecting the exclusion of an implied warranty.² But Phillips, more consistent with himself, holds the same thing of an implied warranty, without, however, any authority for his opinion.³

daily concerns of life. A writing cannot be more certain for the purposes of evidence. More than this; a general usage grows up out of the convenience of business, is deliberately adopted by all, and continues to be constantly acted upon by successive generations of men. Can the solemnities of a deed be witness of greater deliberation than the existence of such a general usage? It is accordingly received by the Courts of England and America as co-ordinate and of equivalent value in evidence with a writing and with a deed. *Wigglesworth v. Dallison*, 1 Doug. 201. When this is settled, it follows under the rules of evidence, that oral testimony is not admissible to show that such a usage does not form part of the written contract. Nothing but evidence of the same order as the contract to be affected by it is admissible for that purpose. I

think the whole of this conclusion was involved in the decision of *Fawkes v. Lamb*, 31 L. J. (Q. B.) 98, by Blackburn, J., and that it is a case directly in point. But what is true of general usage holds good in this same respect of warranties implied by law in the contract, and oral testimony is not admissible to show that the parties at the time of making the contract had agreed to exclude such a warranty.

¹ 1 Phillips, no. 594; 1 Parsons, Ins. 432; 2 Duer, Ins. 668.

² 2 Duer, Ins. 669.

³ 1 Phillips, no. 602.

It cannot but appear odd to find these text writers of the United States citing Mr. Arnould as opposed to their opinion on this subject. I suppose his opinion must have stood so in the First Edition of this work, which appeared in 1848. These learned writers do not condescend to tell the profession what edition of an

Representations are generally to be taken in relation to the time when they are made, whether at or before the initialing of the slip, or at or before the underwriting of the policy; and to be construed to mean, that any facts represented as existing are then true, and that no other material facts are then known to the assured.

Representations refer generally to the time of subscribing the policy.

What is stated before subscription of the policy is liable to be qualified or controlled by what passes at the time of signing.

A broker stated to the underwriter, when the slip was initialed, that the ship was an American, but afterwards, when the policy came to be signed, said nothing of the sort, but only, "that it was an insurance on goods by *The Hermon*," without a word as to the national character of the ship, and Lord Ellenborough held, that the first conversation had been qualified and controlled by what followed, and that the ship was not represented to be American so as to require documents of nationality.¹

Dawson v. Atty.

A representation once made is considered binding, unless there is evidence of its being subsequently altered or withdrawn within the time allowed by law.

An uncontradicted representation continues of force.

The broker, at the time of signing the slip, stated that the ship would sail under convoy, and with a certain armament, and this was held binding, there being no evidence of any further conversation on the subject having passed between the parties, when the policy was signed, or in the period intervening.²

Edwards v. Footner.

author they are quoting; but I find that whenever they cite Arnould in order to differ from him, the citation is from an edition that I am not acquainted with, and therefore the edition of 1848. It might be no injustice to the author or to the publishers of the work, it certainly would be a great convenience to the profession, to be informed by these learned gentlemen what edition it is which they cite from in order to

controvert.

¹ *Dawson v. Atty*, 7 East, 367. This is a remarkable decision, as there is nothing to qualify or cancel the first statement in what is here set down as the second. Lord Ellenborough, however, continued of the same mind when *Edwards v. Footner* was before him, and this case was referred to and approved of by him.

² *Edwards v. Footner*, 1 Camp. 530.

*Christie v.
Secretan.*

The initialing of the slip was always among merchants regarded as the making of the contract, and since the statute 30 Vict. c. 23, the Courts are enabled so to deal with it;¹ and accordingly it is held that after the initialing of the slip, any fresh fact coming to the knowledge of the assured need not be communicated to the underwriters, however material it may be.²

Any repre-
sentation may
be withdrawn
before policy
is signed.

So long as the policy is unexecuted, there is opportunity of withdrawing or qualifying a representation, and this should be done forthwith in case there be reason to suppose that it cannot be sustained as made. Thus, where the agent of the assured, after hearing of the loss of the ship, allowed the post to go with his previous letter uncontradicted, inducing others to suppose that she was safe when the post left, such omission amounted to a misrepresentation which avoided the policy.³

It has been held in the United States, but before the days of the electric telegraph, that, although the assured, or his agents, are bound to act with promptitude and despatch in countermanding an order for insurance founded on false intelligence, they are not bound to resort to extraordinary means of communication for this purpose; they need not send an express unless that be the usual mode.⁴

Misrepresentation to the first underwriter extends to all.

If there be several underwriters to the same slip or policy, a representation to the underwriter whose name stands first extends to all the rest, so that each, when it proves false, may avail himself of the defence. This rule is founded on the reasonable presumption that the others subscribed from their

¹ Ante, Chap. V., p. 259.

² *Cory v. Paton*, L. R., 7 Q. B. 304; L. R., 9 Q. B. 577; *Lishman v. Northern Maritime Ins. Co.*, L. R., 8 C. P. 216; L. R., 10 C. P. 179; *Ionides v. Pacific Fire & Marine Ins. Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517.

³ *Fitzherbert v. Mather*, 1 T. R. 12.

⁴ See *Greene v. Merchant Ins. Co.*, 10 Pickering's Mass. Rep. 402; *McLanahan v. Universal Ins. Co.*, 1 Peter's Supreme Court Rep. 186; 1 Phillips, no. 561.

confidence in the skill and judgment of him whose name stood first, and their belief that he had duly ascertained and weighed all the circumstances material to the risk.¹ This Limitations. rule, however, is subject to many limitations.

1. It must be strictly confined to intelligence pertinent to the proposed insurance as expressed in the slip, such as an underwriter would require, and without which it may be presumed he would not initial the slip or subscribe the policy. It cannot, therefore, extend to such representations as relate to matters of collateral agreement which a subsequent underwriter can have no reason to infer from the terms of the policy to have been communicated to the first.

It only extends to representations pertinent to an ordinary policy.

Thus, in *Pawson v. Watson*, Lord Mansfield held, that a representation that "the ship mounts twelve guns and twenty men," being in effect an engagement that the ship should sail with that armament, could not affect subsequent underwriters to whom it had never been communicated, merely upon proof that it had been made to the underwriter whose name stood first in the policy. "A representation to the first underwriter," says his Lordship, "has nothing whatever to do with that which is the agreement, or the terms of the policy; no man who underwrites a policy subscribes, by the act of underwriting, to terms of which he knows nothing, but he reads the agreement and is governed by that; matters of intelligence, such as that a ship is, or is not missing, are things in which a man is guided by the name of the first underwriter, who is a good man, as to which another will therefore give faith and credit to him, but not as to a collateral agreement, which he can know nothing of."²

Of course if the representation to the first underwriter be of immaterial facts, it cannot avail anyone; and if it was of

¹ The English cases which establish the rule are, *Pawson v. Watson*, 2 Cowp. 785; *Barber v. Fletcher*, 1 Doug. 306; *Stackpoole v. Simon*, 2 Park, Ins. 932; *Marsden v. Reid*, 3

East, 572; *Feise v. Parkinson*, 4 Taunt. 640; *Forester v. Pigou*, 1 M. & Sel. 13; *Bell v. Carstairs*, 2 Camp. 543.

² 2 Cowp. 788.

such a nature as ought to have put the first underwriter on further inquiry, it will be equally imputed to the negligence of the subsequent underwriters that no such inquiry was made.¹

2. Until the recent alteration of the law by the 30 Vict. c. 23,² the applicability of this rule was restricted to the policy, because the slip could not even be given in evidence for any purpose whatever:³ but now as the slip, though not a valid contract of sea-insurance unless stamped, may be given in evidence whenever it is material,⁴ the rule becomes applicable to either the policy or the slip, and will probably, in consequence of the state of facts, be more frequently applied to the latter than the former.

The rule includes only representations that lower the terms.

3. A still further limitation of the same rule is, that it only applies where the tendency of the representation is to induce the underwriters to take the risk on lower terms.

Where the first underwriter was called to prove a representation made to him, the tendency of which would have been to increase the estimate of the risk, Lord Tenterden decided, at *Nisi Prius*, that this evidence was not admissible as against a subsequent underwriter.⁵

The rule not favoured.

Even under these limitations the English Courts have regarded the rule with great jealousy, and on many occasions have expressed their dissatisfaction with it. Heath, J., on one occasion said, "That the evidence had been admitted rather on precedent than on reason;"⁶ and Lord Ellenborough—"Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark, that

¹ *Barber v. Fletcher*, 1 Doug. 350.

² See ante, p. 259.

³ *Marsden v. Reid*, 3 East, 572. In this case the names of the underwriters appeared in a different order on the policy from that on the slip; but the slip was not admissible in evidence, as the law then stood, to show that the underwriter to whom a representation had been made

stood first in order on the slip though not on the policy.

⁴ Per Blackburn, J., *Ionides v. Pacific Fire & Mar. Ins. Co.*, L. R., 6 Q. B. 674, 684, 685.

⁵ *Robertson v. Majoribanks*, 2 Stark. N. P. 503; 2 Duer, Ins. 779.

⁶ *Brine v. Featherstone*, 4 Taunt. 869.

the proposition is to be received with great qualification : it may depend on the time and circumstances under which the communication was made ; but on the mere naked, unaccompanied fact of one name standing first on the policy, I should not hold, that a communication made to him was virtually made to all the subsequent underwriters ;” and his Lordship said, that the question was one of such magnitude, that if it should arise, he should direct it to be put on the record for the opinion of all the Judges.¹

Of course, if the subscription of the first underwriter is obtained under a secret agreement, or understanding, that it is not to be binding, and for the sole purpose of leading others to insure, the exhibition of the policy or slip, thus subscribed, is justly regarded as a fraud on the subsequent underwriters, and on that ground as rendering the policy void.² This rule, it is said, would apply to any prior underwriter, though his name may not be first in the policy.³

Where the first underwriter is a mere “decoy duck.”

¹ In *Forester v. Pigou*, 1 M. & Sel. 13.

² *Whittingham v. Thornburgh*, 2 Vernon, 206 ; *Wilson v. Duckett*, 3 Burr. 1361 ; see also the observations of Lord Kenyon in *Sibbald v. Hill*, 2 Dow's P. C. 262. The first under-

writer in such cases is called in England a *decoy duck* ; on the Continent he is termed a *dolphin*, who leaps from the water that others may follow ; 1 Emerigon, c. ii. s. 4, p. 43.

³ 2 Duer, 679.

CHAPTER II.

CONCEALMENT.

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Definition
and general
principles.

CONCEALMENT, in the law of insurance, takes place at the time of negotiating the contract, and is the suppression of, or neglect to communicate, a material fact within the knowledge of one of the parties which the other has not the means of knowing, or is not presumed to know. Defined in these terms, the law is equally applicable to the assured and the underwriter.

A material fact in this connection is one which, if communicated to the other of the parties, would induce him either to refrain altogether from the contract, or not to enter into it on the same terms.

Defined in relation to the assured as the party acting *malâ fide* or negligently, concealment takes place at the time of negotiating the contract, and is the suppression of or neglect to communicate a material fact, which, if communicated, would affect the judgment of a fair and rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium, or at another.¹

Time of concealment.

In order that a concealment should have the effect of avoiding the policy, it must have taken place at the time of making the contract; and for the reasons already stated in respect of

¹ *Ionides v. Pender*, L. R., 9 Q. B. D. 222; 1 *Parsons, Ins.* 495; Q. B. 531; *Rivaz v. Gerussi*, 6 1 *Phillips*, no. 531.

Representations,¹ the contract is now regarded by the Courts as complete when the slip is initialed by the underwriter. Consequently, anything coming to the knowledge of either party after that, however material it may be, need not be communicated to the other, notwithstanding a policy has not yet been executed in accordance with the slip.²

As we have seen in the preceding chapter, it is a condition of this contract, implied by law as a matter of public policy, that the contract is free from misrepresentation or concealment; and if there is a breach of this condition, either by misrepresentation or concealment of a material fact, the contract is void. Fraud in its effect goes beyond the condition; for if fraud be present in either form, whether of misrepresentation or concealment, it avoids the policy, although the subject misrepresented or concealed be not a material fact.

Principles on which concealment avoids the policy.

Each of the parties to this contract owes to the other all such relevant and necessary information as will enable both to enter into a contract of indemnity in respect of the subject to be insured. It is not enough that if either speaks, he must speak the truth substantially; it is required of him that if he know anything which is special and relevant to the contract, he should communicate it to the other. This obligation arises of necessity out of the nature and objects of the contract proposed to be made, and the inequality of information usually existing between the parties relevant to the circumstances of the risk and the subject to be insured. It is therefore received in law as eminently a contract *uberrimæ fidei*.

It is characteristic of the assured more than of the insurer that all or nearly all the knowledge which he has of a kind available for the purposes contemplated in a contract of marine insurance, is derived from agents and correspondents,

¹ Ante, p. 544.

² *Cory v. Paton*, L. R., 7 Q. B. 304; *Lishman v. Northern Marit. Ins. Co.*, L. R., 8 C. P. 216; 10

C. P. 179; *Ionides v. Pacific Fire and Mar. Ins. Co.*, L. R., 6 Q. B. 674; 7 Q. B. 517.

and this, whether the ship or goods be at home or in a distant part of the globe. There is no shipowner, no shipper or importer without these agents. No insurer would consent to meet the one or the other for the purposes of business who wanted them. The knowledge which they can supply is the indispensable basis of business of this nature, which without it becomes mere gambling, ruinous in its ultimate consequences alike to private and to public interests. It is a tacit condition, therefore, of their meeting that the one of them comes to the other with the latest information respecting the proposed subject of insurance which reasonable diligence in the use of reasonable means of communication can supply. If there be no information forthcoming notwithstanding important events, the insurer left in ignorance is entitled to make the contract and to rely upon this condition for its defeasance in case the assured against his duty shall have been found chargeable with concealment.

It is on the principal that the obligation of disclosing the true state of circumstances affecting the proposed subject of insurance up to the latest hour at which communication of intelligence continues to be reasonable, is imposed by law. It is for him to discover the condition of his ship or his cargo at the latest possible moment before he insures it, or anything relating to it, freight or profits, &c., and if his agent or correspondent fails to forward the intelligence, it is the assured that must suffer the consequence in finding his policy invalid. With one, and only one, exception among all the agents and correspondents of the assured, there is no direct legal obligation on them in relation to an insurance effected in the ordinary way unless special appeal be made to them or any of them. In the absence of such a special appeal, within the limit of time up to which information might reasonably be expected by the principal, whether that information be communicated or not, the knowledge of these agents, since it might in fact have been the knowledge of the assured, must be deemed in law to be his knowledge for the purpose of entering into the contract of marine insurance.

It is not intended or implied that there is a breach of law or legal obligation committed by these subordinate or distant agents by their not forwarding the proper intelligence within proper time. A breach of duty in their business relations as commercial agents there may be in that case, such as their principal in his commercial capacity may effectually control, check, and even punish. But that there is a breach of the condition of the contract by their principal in his coming to the making of it otherwise than posted up with the latest information reasonably possible relating to the subject of insurance, and ready to communicate the same so far as the objects of the contract may require, is the English law, and of the very essence of universal justice.¹

If the principal employ a broker to effect the policy for him, he thereby extends his responsibility for all knowledge of the subject possessed by the broker, whether acquired before or during the agency; for he cannot through that agent obtain contract rights that are of a nature inconsistent with the agent's knowledge, since by the constitution of the agency the broker owes his knowledge to his principal, and in virtue of his principal's duty is bound to communicate his knowledge to the insurer. Such agent, upon finding that his knowledge is hostile to the interests of his principal, cannot throw up the agency, concealing still what he knows, and intending that the policy should be effected through a broker who has not the same knowledge, without thereby putting a fraud upon the insurer through the innocent principal and defeating the validity of the policy so effected.

Lord Esher, on the contrary, holds that if the principal and his agent through whom the policy is effected, disclose all knowledge of the subject of insurance and relating to the risk actually possessed by them at the time of the contract, the law is satisfied; that in the absence of legal obligation upon the agent to communicate his knowledge to the assured

¹ See as to the foregoing propositions, the judgment in *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511, 521, 522.

or the insurer, no other agent than he through whom the policy is effected can bind his principal by his knowledge if not communicated; and that there is no implied obligation in law upon any other agent to communicate his information. The learned Judge therefore holds that *Gladstone v. King*, *Proudfoot v. Montefiore*, and *Stribley v. Imperial Marine Ins. Co.*, cannot be sustained in law.¹

His Lordship at the same time, rejecting public policy from all connection with the contract as being in no way concerned, gives this account of what must be received as a very factitious origin of the condition attaching to it:—"It seems to me that the only persons who can attach a condition to a contract are those who in fact make the contract. Those who have nothing to do with the making of the contract cannot have anything to do with agreeing to a condition which is to affect the attaching of the contract. He who makes the contract agrees to the condition that it shall not be binding if he or the person whose *alter ego* or representative he is has made any misrepresentation, or has been guilty of any concealment. This confines the consideration of an agent's conduct to the conduct of the agent by or through whom the contract is made."² This is a very narrow and unfounded view of the condition attached to the contract, and I think wholly unnecessary to his Lordship's general conclusion on the law of the case; for it may safely be averred that never in fact, since a contract of insurance was for the first time made, has such a condition been mentioned between the parties or their agents. The law, on the contrary, not leaving this provision to the discretion of the parties or their agents, but with a view to preserving the advantages of marine insurance, and preventing contracts of that nature from becoming mere gambling wagers, implies such a condition from the nature and objects of the contract, but allows the parties, if they think fit, by express terms in the contract to exclude the

¹ *Blackburn v. Vigors*, 55 L. J. (Q. B.) 347.

² 55 L. J. (Q. B.) 351.

condition from attaching, a permission which they are not known ever to have used.

The case¹ in which this discussion arose was as follows :—

Blackburn & Co., of Glasgow, finding that a ship on which they were insurers was four or five days overdue, instructed Murison & Co., of the same place, to procure a re-insurance, and they applied to their London agents, Thompson & Co., for that purpose. One hour later on the same day, Murison was informed of facts tending to show that the ship had been lost some days previously. Soon after came the reply from London, quoting a higher rate than the limit fixed. Murison showed the plaintiffs the reply, and then, without communicating to them the information as to the loss, telegraphed in the name of the plaintiffs to London, and thus put the plaintiffs in direct communication with their agents in London, thereby terminating Murison's connection with the business. Re-insurances to the amount of 800% were effected in London the same afternoon; but as rates continued to rise, the plaintiffs closed their communications with Thompson & Co., and next day through their own brokers, Roxburgh & Co., in London, effected the policy with the defendant Vigors. Up to this time both Vigors and the plaintiffs Blackburn & Co. were ignorant of any material information about the ship.

Blackburn v.
Vigors.

Lord Esher held upon that state of facts, that as Murison's agency was terminated before the policy was effected with the defendant, that policy was not invalidated by the knowledge acquired and not communicated by Murison whilst he was the plaintiff's agent. The other members of the Court, Lindley and Lopes, L. JJ., accepting the previous decisions of the English Judges, referred to and dissented from by Lord Esher, as being well founded in law, and advisable in public policy for the prevention of fraud, held that the contract was void by reason of the concealment of a material fact known to Murison whilst his agency for the plaintiffs continued.

¹ Blackburn v. Vigors, 55 L. J. (Q. B.) 347.

Lindley, L. J., says, "It appears to me to be established by the cases to which I have referred, that in order to prevent fraud and wilful ignorance on the part of persons effecting insurances, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one whose *moral, if not legal*, duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing those facts."¹

Proudfoot v.
Montefiore.

In the case of Proudfoot v. Montefiore, the plaintiff, in Manchester, employed an agent at Smyrna, who purchased and shipped for him there a cargo of madder, of which he advised him on the 12th January, and forwarded the shipping documents on the 19th. The ship sailed on the 23rd of that month, and went ashore the same day, whereby there was a total loss of the cargo. Next day the agent had intelligence of the loss, and might have telegraphed the casualty to his principal immediately, but refrained on purpose that his principal might insure the cargo. On the

¹ 55 L. J. (Q. B.) 358.

I have cited the words of Lindley, L. J., for the purpose of showing his view of the kind of obligation which, as I understand him, he considered binding on Murison or any agent in the relation which he sustained under the circumstances of the case before the Court; but as in no way expressing his Lordship's view of the nature of the obligation under which commercial agents and correspondents generally are bound to communicate important events affecting the property of their principals. This latter obligation I have ventured, on the authority of Proudfoot v. Montefiore, and from consideration of the nature and purposes of the contract of marine insurance taken in connection with the general commercial law, and the purposes

and ends that such agents in commerce are appointed to serve,—I have ventured to describe as a mere business duty, any failure in which can be effectually and promptly checked by the principal. On the principal, therefore, it is no injustice to lay the legal duty, and the consequent loss which accrues from failure in that duty. I cannot but think with all the English Judges, who in later times have delivered their opinions from the Bench, that if the law shall be determined in accordance with the opinion of Lord Esher, expressed in Blackburn v. Vigors, marine insurance will become a contract *uberrima fidei*, and the Judge's function in respect of it, the helpless concession of their demands to the fraudulent parties.

26th, which was the earliest post-day for England, he announced the loss to his principal by letter. Meanwhile, before the arrival of that letter, but after the loss had been posted on Lloyd's Lists, the principal effected an insurance on the cargo. It was held, that the policy was void on the ground of concealment of material facts with a fraudulent intention by the agent.¹

"The implied condition on which the underwriter undertakes to insure,—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured shall be made known to him—was not fulfilled; and as was said by the Court in *Fitzherbert v. Mather*, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed"² The Court continued:—"By thus holding we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act."

In the course of their judgment the Court, besides reviewing the English decisions and approving of them, considered the American case of *Ruggles v. General Interest Ins. Co.*,³ before Mr. Justice Story, and expressed their disapprobation of the decision, and of the reasoning by which the learned Judge supported it. In that case, on the 9th February the assured, resident at Newport, Rhode Island, effected a policy in Boston on the sloop *Harriet* for six months in the coasting trade of the United States. That vessel had sailed on the 12th January previous, and was totally lost on Cape Hatteras on the 19th of the same month, and between that date and the date of the policy, the master had purposely refrained

Ruggles v.
General
Interest Ins.
Co.

¹ *Proudfoot v. Montefiore*, L. R.,
2 Q. B. 511.

² L. R., 2 Q. B. 522.

³ 4 *Mason*, 74.

from communicating the loss to her owner in order that he might have time to insure. The learned Judge in the face of these facts sustained the validity of the policy, and his reasoning in support of the decision has been revived and adopted in England by the Master of the Rolls in the recent case of *Blackburn v. Vigors*. Mr. Justice Story's decision was sustained on appeal in the Supreme Court, not only on the ground that the master was not an agent for the purpose of effecting the insurance, but also on the extraordinary ground that by the loss of the vessel the master had ceased to be the agent of the assured.¹

An exception
improperly
made by the
English
judges.

A question that has received but little attention hitherto, although involved as the *ratio decidendi* in two English cases, is by the criticism of the Master of the Rolls become too emphatic to be dismissed with mere mention of the judicial preference for one view of it rather than another. Suppose that a commercial agent of the assured should omit, contrary to his business duty, but without fraudulent purpose, any mention of a material fact relating to the subject of insurance, and as a direct consequence of this omission no mention is or can be made of it by the innocent principal in procuring the policy; what is the effect in law upon the policy so procured? Merely, said Lord Ellenborough, the implied exception from the policy of the average loss resulting from the facts omitted from mention by the agent.² I prefer the opinion, said Blackburn, J.,³ that where there is no fraud on the part of the agent, the policy is not void, save in respect of the average loss not mentioned. The learned Judge and Lush, J., go thus far in their judgment; Quain, J., their colleague, on the contrary—"All we need say is that the question was not taken at *Nisi Prius*, otherwise it might have been necessary to take the opinion of the jury as to the materiality of the omitted communication."

But perhaps the most extraordinary thing in relation to this

¹ 12 Wheaton, 408.

³ *Stribley v. Imperial Mar. Ins.*

² *Gladstone v. King*, 1 M. & Sel. 35. Co., L. R., 2 Q. B. 507.

question is exhibited in the judgment of the Court in *Proudfoot v. Montefiore*; for after expressing their opinion that *Gladstone v. King* was well decided, they follow that opinion up with language which is wholly subversive of the decision so approved of, in so far as that decision sustained the validity of the policy, notwithstanding the concealment of a material fact. They say,¹ "If an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

This language, in perfect accord with which the several propositions to be found near the commencement of this chapter have been laid down, gives full effect to the concealment of a material fact, although it originate with a mere irresponsible agent, and he has in it no fraudulent purpose; and it properly lays the effect of the concealment as if the sole fact of the concealment, together with the duty of disclosure, were on the principal in negotiating the policy. It were vain labour here to conjecture what might have been in the mind

¹ *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511, 521.

of Lord Ellenborough or of Lord Blackburn in giving the effect of law to the opinion which they expressed in the cases that follow.

Gladstone v.
King.

In *Gladstone v. King*,¹ the vessel had been driven on the rocks in Manchineal harbour, Jamaica, and got off again, seemingly without injury; and the master, with no fraudulent intent, omitted to mention it in his correspondence with his owner; but on arriving home, the vessel was examined and found to have sustained damage from the rocks to the extent of 15 per cent. Lord Ellenborough and the rest of the Court held, that the policy was not void, but that the partial loss, the only claim in the action, was an implied exception out of the policy. Such a decision was admitted by the learned Chief Justice to be a novelty, as Scarlet at the bar had asserted it to be. The effect of it in respect of the assured was, that he neither recovered his loss nor got back his premiums. The insurer retained his premiums though there had been no fraud, the only meaning of that being that it was held a valid policy, but did not cover the partial loss. *As there was no other loss, nor hazard of further loss happening, no wrong could arise to the insurer.* But then to accept this judgment as involving a general principle and to apply it to other cases not exactly similar in facts and circumstances, would be not to judge of facts, but to speculate about the unknown, whether subsequent losses were or were not the consequences of the average loss that had been concealed.

Stribley v.
Imperial Mar.
Ins. Co.

In a more recent case² before the Queen's Bench Division, the ship whilst lying off Mazagan, in an open roadstead, the usual place of loading, had been driven out to sea by a hurricane from her anchorage with loss of her anchor and chain; but no mention of this had been made by the master in a letter written to his owner a week after it had happened, and consequently no mention was made of it by the owner to

¹ 1 M. & Sel. 35.

² *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. Div. 507.

the underwriter at the time of effecting the policy. This was the last letter the owner had from the master, and the ship after leaving Mazagan was never again heard of. The Court, as to the total loss, sent the case to a second trial on a question of concealment by the owner himself, which will come under notice separately; but as to this partial loss of the anchor and chain, they held, following *Gladstone v. King*, that in the absence of fraud on the part of the master in suppressing all mention of it, the loss was not covered by the policy, though the policy was not thereby rendered void. At the same time they refused to enter the verdict for the defendant, even as to the partial loss, as it might be the subject of further investigation at the new trial.

What was the effect of the hurricane upon the vessel which drove her out to sea, whether she did not return to her anchorage a mere wreck, only hanging together sufficiently to take in the rest of her cargo, but ready to founder in the first dirty weather she met with, or whether the loss of her anchor and chain did not contribute to her total loss, are possibilities which cannot be proved or disproved, which yet Lord Blackburn assumes to be all one way, and this not only without the shadow of a principle to justify him, but in defiance of the principle that concealment in one material point, apart from fraud, vitiates the whole policy.

If an agent, in ignorance of a loss, effect insurance for his principal who knew of the loss, but not in time to countermand the policy, it is not void by reason of the non-communication. If a principal, knowing of the loss, effect insurance through an agent who was ignorant of it, this concealment of the fact of loss vitiates the policy.¹

The underwriter, equally as the assured, is bound to disclose all circumstances, peculiarly within his own knowledge, in any degree affecting the risk; and, therefore, if at the time of subscribing the policy, he know that the ship has arrived safe, the contract is void as to him, and the premium

Concealment
by the under-
writer.

¹ Valin, liv. 3, t. 6, art. 40, p. 95.

may be recovered back.¹ Moreover, when he underwrites by means of an agent, he does so subject to the law of principal and agent already considered.

Two points determining the nature of the assured's communications.

It is the duty of the assured to communicate to the underwriter all the intelligence he has that may affect the mind of the underwriter as to either of the two following points: 1st, whether he will take the risk at all; 2nd, at what premium he will take it.

This is a duty attaching at the time of effecting the insurance, and not at all dependent on subsequent events,² for the effect of a concealment on the policy is determined not by its eventual relation to the nature of the risk, but with reference to its immediate influence on the judgment of the underwriter. For so is the law, that were the intelligence concealed to turn out to be wholly unfounded, or the loss to arise from a cause totally unconnected with the fact concealed, the policy is nevertheless void.

Seaman v. Fonnereau.

The agent of the assured, before effecting the policy, held a letter from the captain of another ship stating that he had been in company with the ship insured, and lost sight of her all at once at twelve o'clock at night,—that she had been reported leaky by her captain the day before,—and that a hard gale had ensued the day after. It was held that this intelligence ought to have been communicated to the underwriter, and that the policy was void by reason of its suppression; yet in point of fact the inference suggested by the intelligence turned out to be unfounded, and the ship was lost, not by perils of the sea, but by capture, and that not till a week after the period to which the letter referred.³

Lynch v. Hamilton.

A policy was effected on goods on board "ship or ships"

¹ Per Lord Mansfield, in *Carter v. Boehm*, 1 W. Bl. 594; 3 Burr. 1909. See also 3 Benecke, *System des Assuranz*, c. x. pp. 90, 91.

² See the dicta of Mansfield, C. J., *Lynch v. Hamilton*, 3 Taunt. 37, 44, and of Lord Ellenborough, *Lynch v.*

Dunsford, S. C. in error; 14 East, 494, 497; and of the Court in *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. D. 507.

³ *Seaman v. Fonnereau*, 2 Str. 1183.

from the Canary Islands to London, by an agent of the assured, who at the time knew that a portion of the goods to be insured were on board *The President*, and also that *The President* had been reported at Lloyd's, as at sea, deep and leaky. He did not inform the underwriter that *The President* was one of the ships connected with the proposed risks, so that the underwriter had no means of applying the intelligence existing at Lloyd's. Under these circumstances the Court of Common Pleas held, and the Court of King's Bench affirmed their decision, that the suppression of this fact by the assured vitiated the policy, notwithstanding it turned out that the intelligence at Lloyd's was unfounded, *The President* never having been deep or leaky on any part of the voyage insured, and that she was lost, not by perils of the seas at all, but by capture, which occurred three weeks after the period referred to in Lloyd's intelligence.¹

The result, therefore, is, that every concealment by the assured of a material fact, whether by design or mistake, avoids the policy; and that it has this effect, although the intelligence suppressed should ultimately turn out to be untrue, or the loss to have arisen from a cause quite different from that which the intelligence, if communicated, might have given reason to apprehend.

Result of the authorities.

The practical rule for policy brokers and other agents, consequently, is to disclose to the underwriter all they know respecting the proposed adventure, and not to exercise their own judgment as to the materiality of any part of the information they possess; for if they do not disclose the whole, and what is kept back appears to the Court to be material, the policy will be avoided, though the concealment was without any intention of fraud, and arose merely from an error of judgment.²

Practical rule for brokers.

If fraud enter into the contract it vitiates the policy, whether the thing concealed be material or otherwise.

¹ *Lynch v. Hamilton*, 3 Taunt. 37; *Lynch v. Dunsford*, 14 East, 494, *S. C.* in error.

² See per curiam, in *Shirley v. Wilkinson*, 1 Doug. 306, note.

A series of four open policies on fruit and produce from Greece and the Ionian Islands to Liverpool or London "by ship or ships" was effected at several successive dates in the year 1875, the one to follow and succeed the other of them *seriatim*. At the time of effecting the later two of these policies respectively, declarations of shipments had been made on the earlier two of the four policies, but they remained unexhausted to a large amount in consequence of the shipments having been declared very much under their real value. It was after the safe arrival of the respective cargoes, and to enable the assured to place other cargoes under protection of the premiums already exhausted by previous shipments, that these declarations under value were made. In this state of facts there was a total loss of a large shipment of produce sunk in the Thames, which was declared on the apparently unexhausted policies, and on the policies which had been effected to follow. The jury, having regard to the effect of what seemed to be the unexhausted state of the earlier policies in inducing the underwriters to subscribe the later policies, found that the declarations under value were a material fact which had been fraudulently concealed at the time of negotiating the two later policies, and the Court of Appeal sustained their finding.¹

Time of sailing, or being last heard of.

The time of the ship sailing, or the time of her being last heard of, are facts which, one or other, must enter into and form part of every conceivable case. But whether in any particular case, this or that, as it happens to be, is a material fact to be disclosed on occasion of proposing to insure, is often a question of critical and perplexing difficulty. The criterion of the materiality of any fact has been already stated. Beyond this, it seems that nothing more definite can be laid down. What seemed to be a more definite rule, laid down by so high authority as Tindal, C. J., must now be considered as set aside.

¹ Rivaz v. Gerussi, 6 Q. B. D. 222.

That learned Judge, in *Elton v. Larkins*,¹ said:—"The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a missing ship. If the underwriter inquires and a false answer is given, that will vitiate the policy; but it is not generally necessary *a priori* that the assured should communicate the time of sailing."

Except what relates to the false answer, every part of this statement may now be considered to be effectually impugned by the following cases:

A policy on ship "at and from Mazagan" was effected by the plaintiff on the 24th of February, who, at the time of effecting it, made no mention of a letter received by him on the 24th of January, from the master of the ship, dated the 9th of January, and stating that he had had a fine passage out; that he had commenced loading, but had very bad weather and did not know when he would finish; he would write again. The master never did write again; and the ship after sailing from Mazagan was never again heard of. The main question put to the jury by Grove, J., following the above authority of Tindal, C. J., was, whether the ship was, at the time of effecting the policy, an overdue ship? The jury found in the negative, and gave a verdict for the plaintiff. But the defendant moved for a new trial on the ground of misdirection. The Court, Blackburn, J., presiding, held that the proper question had not been put to the jury, and said that the proper question was, whether the contents of the master's letter, the dates at which it had been written and received, and the time that had elapsed since anything had been heard of the vessel, were not facts which might properly have influenced the underwriter as to the accepting of the risks. "I think," said Blackburn, J., "the test is whether a fair and reasonable underwriter, looking at this letter and the circumstances under which it was received,

Stribley v.
Imperial Mar.
Ins. Co.

¹ *Elton v. Larkins*, 5 C. & P. 392.

would say, 'I think this is a speculative risk, which I will either decline to take, or, if I do take it, it shall be at a greater premium than is usual.'"¹

*Ratliffe v.
Shoolbred.*

A shipowner, on the 22nd of February, having information that his ship had sailed from the coast of Africa on the 2nd of October, directed his broker, "as the ship had been rather long, and he did not think it prudent to run so large a risk at so critical a time," to effect an insurance on her "at and from the coast of Africa to the West Indies;" adding, "We expect to hear from her soon;" and ordering the broker to communicate to the underwriters "that the ship was on the coast on the 2nd of October," but saying nothing of her having sailed on that day. There was here an implied misrepresentation, and an express concealment, which the Court held to be fatal to the policy.²

*M'Andrew v.
Bell.*

So, where the owner, on the 24th of November, received a letter from Lisbon, written on the 8th of November, informing him that the ship was then ready to sail from that port, but did not effect an insurance on her until the 2nd of December, after the arrival from Lisbon of another vessel which had sailed at the same time as the ship insured, and even then did so without communicating to the underwriters the letter he had previously received; Lord Kenyon held that the keeping back this letter avoided the policy.³

All ships sailing to the Baltic before the abolition of the Sound dues, used to touch at Elsinore to pay these dues, and were entered in a list called the Sound List: the voyage from Liverpool to Elsinore could then be performed in from fourteen to eighteen days, and the list be brought to England in ten or twelve; so that, in thirty days, at the most, it could be known here whether a ship sailing from Liverpool had or had not touched at Elsinore. Hence, where an insurance was effected on the 23rd of October, on a ship from Liverpool to

*Webster v.
Foster.*

¹ *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. Div. 507.

shall on Ins. 466.

² *M'Andrew v. Bell*, 1 Esp. 373.

³ *Ratliffe v. Shoolbred*, 1 Mar-

the Baltic, and it appeared that the ship had sailed from Liverpool on the 7th of September, or more than six weeks (forty-six days) before the policy was effected, and no news had been heard of her down to that time, Lord Kenyon told the jury that the plaintiffs, at the time the policy was effected, must have suspected the ship to be a missing ship, and ought to have communicated to the underwriter the time of her sailing.¹

It was remarked in this case by his Lordship as a suspicious circumstance, that, though the plaintiffs were in London at the date of the policy, and could have effected it there, they chose to get it effected at Hull. It also appeared that the underwriters inquired of the broker the time of the ship's sailing, and that he told them he knew nothing about it, having no information from the plaintiff on the subject.

The voyage from Berderygge to London was often performed in four or five days, and, when the weather was not favourable, in about ten days. On the 13th of December, the consignees in London received from the shipper of the goods in Berderygge a letter, dated the 30th of November, and containing these words: "I think the captain will sail tomorrow; but should he not be arrived in your port, be so kind as to make the insurance as low as you possibly can on my account."

Willes v.
Glover.

The consignees accordingly effected an insurance on the goods "from Berderygge to London," on the 14th of December, the day after receiving this letter, and without communicating it to the underwriters. It turned out that the ship did not, in fact, sail till the 24th of December; yet the Court held the suppression of the letter to be a fatal concealment. Though the jury had found for the plaintiff, on the ground that the concealment was not material, the Court sent the case down for a new trial, and then a verdict was given for the defendant.² It appeared moreover to the Court, from the

¹ Webster v. Foster, 1 Esp. 406.

² Willes v. Glover, 1 B. & P. N. R.

14. I submit in this case (and that on the high authority of Maule, J.,

terms of the shipper's letter, that in his opinion a high premium would probably be exacted if the ship had not arrived before his letter; the letter, therefore, seemed to them material to be communicated to the underwriters, with a view to the premium.

Bridges v.
Hunter,

An insurance was effected on the 12th of November, on wines by *The Stag*, "at and from Oporto to Liverpool," "to return four guineas per cent. for convoy and arrival." Twelve days before effecting this insurance the plaintiff had received two letters, written from Oporto, one on the 11th of October, stating, "We are loading the wines on board *The Stag*, Captain Whatley, who pretends to sail after to-morrow;" the other, dated the 13th of October, enclosing the bills of lading, which were filled up with the words "With convoy." Neither of these letters was communicated to the underwriters. *The Stag* did sail on the 13th of October, but failing to come up with convoy, was obliged to put into Lisbon. The convoy with which she ought to have sailed arrived in London before her on the 31st of October, and on the 1st of November a list of the ships that had sailed with it was entered at Lloyd's, in which the name of *The Stag* was not included. Lord Ellenborough told the jury that the question was, whether a disclosure of these letters would probably have varied the judgment of the underwriter so as to have induced him either to decline subscribing the policy, or to demand a higher premium; and if so, that they were material letters to be communicated. The jury, notwithstanding, found a verdict for the plaintiff; but the Court, thinking they had come to a wrong conclusion on the facts, granted a new trial.¹

Foley v.
Moline.

The non-communication of a letter, showing that a vessel

in *Mackintosh v. Marshall*, 11 M. & W. p. 119, as I have done in that of *Rickards v. Murdock*, *post*, p. 568 note,—that the only illegal suppression was of the date of the expected sailing; and that if that date had been communicated, the letter, con-

taining besides only an expression of opinion or of apprehension founded on nothing that was unknown to the underwriter, ought not to have been shown.

¹ *Bridges v. Hunter*, 1 M. & Sel. 14.

was out only nine days on the voyage from Youghal (in Ireland) to Weymouth, which usually was a voyage of eight or ten days, was held not such a concealment as would avoid the policy.¹

A policy was effected at Whitehaven on the 8th January, upon the ship *Cumberland*, "at and from Barbadoes to Liverpool," in consequence of a letter of orders from a Liverpool broker, in which he said, "*The Cumberland*, we expect, will have taken her departure from Barbadoes on the 26th of November; *The Barton* sailed on the 24th, and arrived at Liverpool last Sunday (the 5th January), but she is coppered, and a remarkably fast vessel." This letter was shown to the underwriters at the time of effecting the policy; but it was not communicated that the ship *Agreeable*, also coppered and remarkably fast, which had left Barbadoes on the 29th November, had arrived at Liverpool on the 5th of January. *The Cumberland* was not coppered, was full built, and a slow sailer, and was not considered a missing ship at the time the letter of orders was written. Upon these facts the jury found for the plaintiff, and the Court of Common Pleas refused to disturb the verdict.²

An insurance was effected on the ship *Fanny*, "at and from Cadiz to London," on the 29th of December, at which time the plaintiff held a letter stating that she was to sail on the 22nd of November; but this letter was not communicated to the underwriter. It was in this case that Tindal, C. J., laid down the doctrine cited above,³ which is no longer the doctrine of the English Courts, and accordingly put it to the jury as the main question in the cause, whether *The Fanny*, having been thus out thirty-seven days from Cadiz to London at the time of effecting the policy, could fairly be called a missing ship, and the jury having found

¹ *Foley v. Moline*, 5 Taunt. 430; 1 Marshall's Rep. 117, *S. C.*

² *Littledale v. Dixon*, 1 B. & P. N. R. 151. Although Mr. Marshall thinks this case wrongly decided,

Judge Duer, for very good reasons, upholds its authority (*Marine Ins.* vol. ii. pp. 544, 545).

³ *Supra*, p. 563.

Littledale v. Dixon.

Elton v. Larkins.

for the plaintiff, the Court refused to disturb their verdict.¹ This case must now be regarded as no longer of any authority.

Rickards v.
Murdock.

A merchant at Sydney consigned goods to England by *The Cumberland*, (sailing from Sydney about the end of April, and to sail from Van Diemen's Land about the last week in May,) and sent by *The Australia* (which sailed from Sydney the 20th of May) an order to insure, directing his London agents to wait thirty days after the arrival of *The Australia* before effecting the insurance on *The Cumberland*, in order to give the latter ship every chance of arriving. This order by *The Australia* was retained for thirty-six days, and as *The Cumberland* had not then arrived, although two ships had in the meantime come in which left Sydney after *The Australia*, they procured an insurance, not informing the underwriters when, or by what ship, the order to insure had arrived, nor how long and why they were to wait before effecting the policy. The jury found this a material concealment, and the Court refused to disturb their verdict, being of opinion that both these facts ought to have been communicated to the underwriters.²

Westbury v
Aberdeen.

Two ships, *The Fruiter* and *The King George*, sailed from Malaga for London, the first on the 9th of October, the second on the 10th; both ships were frequently in sight of each other till the 21st of October, on which day *The Fruiter*,

¹ Elton v. Larkins, 5 C. & P. 85, 385; 8 Bing. 198.

² Rickards v. Murdock, 10 B. & Cr. 527; see *S. C.* at N. P.; Danson & Ll. 221, and Ll. & Wels. 132.

Sed quære as to the part of the letter which required the delay, and stated the reason. No one can doubt its having an effect, a most prejudicial effect; but it is not on that ground, surely, a proper subject of discovery, since it would be the occasion of blind prejudice, and therefore an impediment to the exercise of sound judgment.

The counsel for the underwriter argued, in accordance with this opinion of the Court in another case, where the circumstances were somewhat similar [*Mackintosh v. Marshall*, 11 M. & W. p. 119]; but Maule, J., presiding at the trial, in addressing the jury said,—“Another ground has been a good deal relied on by the defendant, namely, the direction not to insure until a reasonable risk had been run. In my opinion that is not a circumstance which the assured is bound to communicate.” See *Bell v. Bell*, 2 Camp. 475.

off Oporto, parted company with *The King George* in a gale. *The Fruiter* arrived in London on the 30th October, and upon knowledge of these facts the plaintiff on the 3rd of November effected a policy on *The King George* "at and from Malaga to London," informing the underwriter of the time of sailing from Malaga, but not that *The Fruiter* had seen *The King George* off Oporto on the 21st. *The King George* was lost in the chops of the channel on the 25th of October. Under the direction of Lord Abinger, that the fact of *The Fruiter* having seen *The King George* off Oporto was not material to be communicated, the jury found for the plaintiff. The Court, however, granted a new trial, holding that the question of the materiality of these circumstances ought to go to the jury.¹

A bill drawn at Seville on the 11th of January for the disbursements at that port, and sent thence on the 17th, which arrived in London on the 31st, was held to be material in respect of these dates, and ought not to have been concealed by the broker at the time of effecting a policy on the ship in question on the 21st of February.²

The ship *Ocean* sailed from Elsinore for Hull in rough weather, on the 26th of July; six hours after, her owner sailed from Elsinore for Hull in another ship. This was a voyage sometimes of four or five days, but on the average of eight or ten. Owing to tempestuous weather, the owner of *The Ocean* did not arrive at Hull till the 9th of August, or fourteen days after leaving Elsinore; and then, finding *The Ocean* had not arrived, he immediately caused his broker to effect an insurance on her "at and from Elsinore to Hull, from the 26th July inclusive." The broker, at the time of effecting this policy, did not communicate any more of the above facts than that *The Ocean* was "all well at Elsinore on the 26th of July." The Court held that this was a concealment fatal to the policy.³

A Liverpool merchant, on whose account a quantity of

Elkin v. Jansen.

Kirby v. Smith.

Mackintosh v. Marshall.

¹ *Westbury v. Aberdeen*, 2 M. & W. 267.

655.

³ *Kirby v. Smith*, 1 B. & Ald.

² *Elkin v. Jansen*, 13 M. & W. 672.

train oil was to be shipped at St. John's, Newfoundland, on board *The Elizabeth*, wrote on the 27th of January to his brokers in London to effect an insurance, telling them "that he had advices from St. John's of the 27th of December, of the train oil being shipped for him on board *The Elizabeth*, to sail the end of the month." The real facts were:—1st. That he had received no advices of that date from St. John's, but had been merely told, that intelligence from St. John's down to the 27th had come to hand, which made no mention of the sailing of *The Elizabeth*; and 2nd. That before giving the order to insure, he had received two letters from St. John's, both dated the 24th of December, but the second not sent till the 30th, in the first of which his correspondents stated that *The Elizabeth* was to sail on the 25th, that she was a new vessel, that he might endeavour to save the insurance by giving three or four days, according to the state of the weather in England; and in the second they said, "You can allow her from sixteen to twenty days: You can run a reasonable risk to save the insurance, but all will depend on the state of the weather." The insurance having been effected on the 27th January, solely on the letter of instructions sent to the broker, the Court were clearly of opinion, that these facts showed both a positive misstatement and a material concealment, either of them sufficient to avoid the policy.¹

Concealment
of facts that
aggravate the
risk.

In a time of war, any circumstance, within the knowledge of the assured, and not equally within the knowledge of the underwriter, which affects the national character of the subject insured, and therefore exposes it to capture or detention, must be disclosed to the underwriters.

Yet there may be facts of this nature most material to the risk, and not within the knowledge of the assured, or his means of information. Thus a ship, warranted Portuguese,

¹ *Mackintosh v. Marshall*, 11 M. & W. 116.

was taken by a French privateer, and condemned because she had an English supercargo on board, on the ground of a recent French ordinance declaring all neutral ships liable to capture if the supercargo was the subject of a state at war with France; Lord Mansfield held that, as neither the assured nor the underwriters appeared to have known anything of this ordinance, the former was not guilty of a material concealment in not disclosing the fact of the supercargo being English.¹

Mayne v. Walter.

His Lordship, however, was of opinion that, though this ordinance was contrary to the law of nations, yet, if known to the assured, it would have been a material concealment not to have disclosed the fact of his non-compliance with it; and if, on the other hand, the underwriters had known of it, they ought to have inquired who was, or was to be, supercargo.²

Although a knowledge of the political state of the world, of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course of trade contemplated by the insurance, must all necessarily be imputed to the underwriter, and therefore need not be disclosed by the assured: yet it has been held in the United States, and apparently on very good grounds, that the new or shifting regulations of foreign states, by which the property is exposed to seizure, if privately known to the assured, ought to be disclosed by him, for they cannot be presumed to be necessarily within the knowledge of the underwriter.³

Private information of new regulations.

All facts lying peculiarly within the knowledge of the assured, which may expose the property to belligerent risks, ought to be disclosed to the underwriters. Thus, it has been

Facts which would expose to capture.

¹ *Mayne v. Walter*, 1 Park, Ins. 473.
431; 1 Marshall, Ins. 402, 471.

² 1 Marshall, Ins. 402, 471; see also *Barzillay v. Lewis*, 1 Marshall, Ins. 402, 404; and *Marshall v. Union Ins. Co.*, Condry's Marshall,

³ *Hoyt v. Gilman*, 8 Mass. Rep. 336; *Blagge v. New York Ins. Co.*, 1 Caines, 549; 1 Phillips, nos. 595, 596, 597; see also 2 Duer, 516, 561.

held in the United States, that not disclosing that the property insured belongs to a house established and doing business in a belligerent state will be a material concealment, and defeat a policy made in a neutral country "for whom it may concern;"¹ so the not disclosing that enemy's property embarked in a neutral ship was covered as the property of a neutral, was there also held to be a material concealment, vitiating the policy.²

Bates v.
Hewitt.

The Georgia had been in the service of the Confederate States of America as a cruiser during 1863-4, and was afterwards laid up in Liverpool, and there purchased at public auction by the plaintiff, who converted her into a merchant vessel. When he proposed her to the defendant for insurance, it was as "*The Georgia*, s. s., chartered on a voyage from Liverpool to Lisbon and the Portuguese Settlements on the West Coast of Africa and back." She was captured on her voyage by a war steamer of the United States. It was held that the plaintiff ought to have communicated the fact that she had been the Confederate cruiser, and consequently that by reason of this suppression the policy was void.³

Campbell v.
Innes.

Ship and goods, the property of an American subject, were, in a policy dated the 30th July, 1812, insured "from London to certain ports in America against all risks, American capture and seizure included." On arrival, the ship was seized by the American government, on account of a war with America, which had broken out in the same month of July, 1812, before, but not known till after, the policy was effected. The fact that the assured was an American subject was not stated on the face of the policy, nor disclosed by the broker to the underwriter, and this was held by Lord Tenterden and the Court of King's Bench to

¹ *Bauduy v. Union Ins. Co.*, 2 Washington's C. C. Rep. 391, cited 1 Phillips, no. 624. See, however, *Buck v. Chesapeake Ins. Co.*, 1 Peter's Sup. C. Rep. 151; 1 Phillips, no. 625.

² *Stocker v. Merchants' Fire and Marine Ins. Co.*, 6 Mass. Rep. 210; 1 Phillips, no. 629.

³ *Bates v. Hewitt*, L. R., 2 Q. B. 595. See further as to this case, post, p. 582.

be a suppression that vitiated the policy, since the fact, if disclosed, might have made a material difference to the risk.¹ It is manifest from the fact of American seizure being included as one of the risks in the policy that war between this country and the United States was at the time of effecting the insurance feared and anticipated.

So, sailing without convoy, unless the ship be within the exception of the convoy statutes, is a material circumstance to be disclosed. A broker having proposed an insurance on the ship *Sophia*, from Bristol to Port Mahon, &c., with liberty to seek, join and exchange convoy in the English and Irish Channels, the underwriter stated, that a ship called *The Sophia*, of Bristol, was reported at Lloyd's as being then at sea without convoy; the broker afterwards was informed by his employer that this was the same ship; this letter however was not communicated, and the Court held that, as the ship in question was not within any of the exceptions of the Convoy Act, the concealment was fatal to the policy effected under these circumstances.²

Without
convoy.

Sawtell v.
London.

If the ship was foreign built, and, therefore, not within the scope of the Convoy Act, the fact of her having sailed without convoy need not have been communicated, nor yet the fact that she was foreign built, or otherwise excepted from the operation of the Act; for it is the duty of the underwriter to obtain such information for himself.³

Long v. Duff.

Where an insurance was effected on goods "to return five per cent. for convoy and arrival;" the non-communication of the fact that the vessel had sailed without convoy, coupled with the above stipulation, was held fatal to the policy.⁴

Reid v.
Harvey.

¹ Campbell v. Innes, 4 B. & Ald. 423.

Although this war did not break out till the month of July, 1812, differences had arisen some time previously between the British and U. S. governments, and were the subject not only of common conversation,

but of special reference in the speech from the throne on the 7th January in that year.

² Sawtell v. London, 1 Marshall's R. 99; 5 Taunt. 359.

³ Long v. Duff, and Long v. Bolton, 2 B. & P. 209.

⁴ Reid v. Harvey, 4 Dow's P. C. 97.

The state of
the ship on
the voyage.

All material information communicated to the assured with regard to the state of the ship in the course of the voyage ought to be disclosed whether it be certain intelligence or doubtful rumour. If it concern matters preceding the commencement of the voyage, *e.g.*, such as would be covered by a warranty of seaworthiness, Lord Ellenborough was of opinion that it was unnecessary to disclose it:¹ under a time policy it may be otherwise.²

De Costa v.
Scandret.

One that had a doubtful account of a ship like his own being captured, caused his own to be insured without communicating what he had heard, and the insurance was held to be void.³ So in case of rumoured shipwreck.⁴

Durrell v.
Bederley.

A policy was effected on the 24th of March on a privateer, which had sailed from Jersey on the 6th, and reports in Jersey that some French frigates were about the coast and had made a capture on the 7th, continued to prevail and receive credit until the plaintiff sent the orders on which the insurance was effected, yet he had not said a word about them in his letter; this was held to be a material concealment which vitiated the policy.⁵ So where the plaintiff concealed from the underwriters the fact that he had received a letter from the Cape of Good Hope, stating that there were then two or three French privateers in those seas, he was nonsuited on the ground of that concealment.⁶

Beckthwaite
v. Nalgrove.

Important,
though ultimately
false.

Even though the report eventually prove to be totally false and unfounded, its communication, as we have already seen, is not on that account less indispensable, if it would have

¹ Per Lord Mansfield, *Shoolbred v. Nutt*, 1 Marshall, Ins. 474; per Lord Ellenborough, *Haywood v. Rodgers*, 4 East, 590.

² *Russell v. Thornton*, 4 H. & N. 788; 29 L. J. (Ex.) 9; in error, 30 L. J. (Ex.) 69.

³ *De Costa v. Scandret*, 2 P. Wms. 170.

⁴ *Nicholson v. Power*, 20 L. T., N. S. 580.

⁵ *Durrell v. Bederley*, Holt, N. P. 283. The privateer, it appeared, had actually been captured by the French on the 7th of March, about thirty miles from Jersey.

⁶ *Beckthwaite v. Nalgrove*, Holt's N. P. 388, cited in 3 Taunt. 41.

materially influenced the judgment of the underwriter in assuming the risk.¹

A., accustomed to open floating policies on which he declared shipments from abroad as he heard of them, having received intelligence of a shipment for him to be made by *The Candida* about the same time that an anonymous letter had been received at Lloyd's of an intention to lose that vessel on the ensuing voyage, concealed his expectation of a shipment by her, and his knowledge of the letter respecting her owners when he was opening a fresh policy, but did so on the reasonable belief that he should be able on the coming forward of her bills of lading to declare her shipment on the policy already open. He was disappointed of this expectation by the mere accident of advices of other vessels coming to hand before those as to *The Candida*, and when intelligence of her did come forward he was obliged to declare her on the fresh policy. Held by the Court of Queen's Bench that by this concealment the policy had been invalidated.²

"Loose rumours, indeed, which have gathered together, no one knows how, need not be communicated:"³ and intelligence may be so general, and its application to the subject insured so doubtful and remote, that the assured need not communicate it, though it may possibly turn out to be related to the subject insured.⁴

Not loose
rumours.

Caution, however, in seeking to be safe will rather trust to a full disclosure of rumours, as the following case will illustrate. Caution.

The plaintiff in Liverpool, on the 8th October, wrote to his broker in London to insure 5000*l.* on the ship *Cambria*, and a similar sum on her freight. On the evening of that day his eye met a paragraph in the "Liverpool Mercury," which caused him to write to his broker on the 10th thus: "Since writing on Saturday a paragraph in the 'Mercury,'

Morrison v.
Universal
Mar. Ins. Co.

¹ *Seaman v. Fonnereau*, 2 Str. 1183; *Lynch v. Hamilton*, 3 Taunt. 37, *S. C.* in error; *Lynch v. Dunsford*, 14 East, 494.

² *Leigh v. Adams*, 25 L. T., N. S. 566.

³ Per Gibbs, C. J., in *Durrell v. Bederley*, Holt's N. P. 285.

⁴ 1 Phillips, Ins. no. 610; *Ruggles v. General Int. Ins. Co.*, 4 Mason, R. 74.

'*Cambria* qy., *Cameo*, from New Orleans, aground on North Breakers.' To-day's 'Mercury' says, 'The vessel on the North Breakers reported yesterday as *The Cambria* is stated to be *The Cameo* from New Orleans.' Can you find out at Lloyd's? Let me know before acting." The broker made inquiries that satisfied him it was not *The Cambria*; and on the 12th he effected a policy on freight with the defendants, without mentioning what had appeared in the public newspapers or in Lloyd's list, in which the above announcement had first appeared on the 8th. It turned out to be, in fact, *The Cambria*, and the concealment was held fatal to the policy.¹

State of the weather.

The assured, in a retrospective policy, is bound to disclose the state of the weather subsequently to the ship's sailing when the voyage commences from a foreign port, if the assured have private information, *e. g.*, of some violent storm at or near the port within so short a period after her sailing as that she might have been exposed to it. If the ship sails from a home port, the underwriter is as well informed as the assured of the state of the weather; and, unless the storm were all the more violent, it would not likely affect his estimate of the risk.²

Nature of cargo.

The nature of the cargo shipped or intended to be shipped may be most material to be communicated. For without exactly rendering the ship unseaworthy, a cargo may be of a nature less desirable for safety than another, owing to the dead weight in proportion to bulk, or its tendency to shift, its unwieldiness for stowage, or its gaseous or other dangerous chemical or inflammable qualities, and the like. In a recent

¹ *Morrison v. Universal Mar. Ins. Co.*, L. R., 8 Ex. 197.

² See the two American cases, *Ely v. Hallett*, 2 Caine's Rep. 57, and *Fiske v. New England Ins. Co.*, 15 Pickering's Rep. 310, cited 1 Phillips, no. 577, not without dissent from the judgment in *Ely v. Hallett*. The ground of that decision was, that the

assured's knowledge was precise and specific, his communications vague and general; he knew there had been a violent storm at the port, he only communicated that there had been "blowing weather and severe storms on the coast." Even thus the case is *inter apices juris*; see the comments of Judge Duer (vol. ii. pp. 399-401).

case excessive valuation was held a circumstance material to be communicated.

It appeared that part of the cargo insured consisted of 222 casks of whisky, the cost, charges, and insurance of which amounted to 973*l.*, but which were valued for insurance at 2800*l.* It was in evidence that excessive valuation to such an extent as here was considered by underwriters to be a speculative risk, which one class of underwriters would not take at all, and another class would take only if a sufficient premium were offered; that 25 per cent. added was not unusual; and that in one case 30 per cent. added had been taken by the former class; but that beyond this it became a speculative risk. The excuse offered by the assured was that the excess represented expected profits at a Russian port, which was not at the time of shipment within the geographical range of the Russian Custom House, but was to be shortly brought within that line; and that a paper containing the insured value was shown to the English underwriter, containing these words, but in German: "On spirits with anticipated profits, however high or low." The underwriter saw the German words, but did not understand them. The jury found that the concealment was without fraud but was material; and the Court refused to disturb their verdict.¹

The port of loading is material.

The true port of loading.

Goods were insured "at and from Genoa to Dublin, the adventure to begin from the loading to equip for the voyage," but the goods were actually loaded at Leghorn and not at Genoa, which was an intermediate port into which the ship was obliged to put and wait five months for convoy, and the non-communication of this fact was held to be a material concealment.²

Where it was known that the ship was to load at a place called Laguna de los Padres, a mere anchorage in an open

Harrower v. Hutchinson.

¹ *Ionides v. Pender*, L. R., 9 Q. B. 531.

² *Hodgson v. Richardson*, 1 W. Bl. 463.

roadstead, which was unknown to underwriters as a port of loading for Europe, and the risk when express mention of that place was made had been already refused, it was held to be a vicious concealment, if not moral fraud, to effect a policy on the same risk without further description of it than "at and from the port of Buenos Ayres and port or ports of loading in the province of Buenos Ayres."¹

Any service
of danger.

So is any service of peculiar danger a subject of material concealment, if it cannot be inferred from the terms of the policy, *e. g.*, to employ the ship in the foreign smuggling trade.²

Serious
damage to
the ship.

Neglect by the captain of a ship, aware of her having met with an accident that might be the cause of serious damage, to inform his owners of it before effecting the policy, will at least prevent them recovering on the policy for loss resulting from the accident.³

Aggravated
consequences
of loss.

The Thames lightermen at the port of London, finding that the law of common carriers bore hard upon them when it gave insurers recourse against them for loss which had not been the consequence of negligence, formed an association for the purpose of doing the lighterage on the terms of being subject to liability for loss only in case of negligence, briefly called by them "no recourse terms." Insurers, upon this becoming public, published their disapproval of that course, and thenceforward refused to subscribe policies containing craft risks, except on a higher scale of premium wherever the "no recourse terms" had been adopted by the assured. Policies on goods containing the craft risk were effected for the plaintiffs with the defendant. Before the policies had been effected, the plaintiffs had agreed with a particular lighterman that he should lighter all their goods on the "no recourse terms." This was not made known to the defendant.

¹ *Harrower v. Hutchinson*, in error, L. R., 5 Q. B. 584, reversing the judgment below, L. R., 4 Q. B. 523.

² 1. *Emerigon*, 172; and see his opinion in 2 *Valin*, liv. 3, t. 6, art.

49, pp. 127, 128.

³ *Gladstone v. King*, 1 M. & Sel., 35; *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. Div. 507. Ante, p. 558.

at the time of negotiating the policies, which were underwritten, therefore, on the same terms as formerly, that is, for a lower premium than would have been demanded for craft risk coupled with no recourse terms. A loss having occurred under these policies in the course of the lighterage, this action was brought, and it was held that this suppression of any mention of the agreement with the lighterman was concealment of a material fact which a fair and reasonable underwriter would have taken into account in fixing the terms on which he would accept the risk, and therefore vitiated the policies.¹

“The assured need not mention what the underwriter knows, what way soever he came by that knowledge; or what he ought to know; or takes upon himself the knowledge of; or waives being informed of; or what lessens the risk agreed and understood to be run; or general topics of speculation; or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, probability of hurricanes, earthquakes, &c.; or every cause which may occasion political perils, from the rupture of states, from war, and the various operations of it, upon the probability of safety from the continuance and return of peace, or from the imbecility of the enemy.”²

Matters that need not be communicated.

For instance, facts comprised in the general usages of trade, such as the usage of the Newfoundland trade for ships arriving on the coast either to be employed for some time in fishing on the banks (called banking), or to make intermediate voyages in the American seas, before beginning to take in their homeward cargo.³

What the underwriter ought to know.

¹ *Tate v. Hyslop*, 15 Q. B. D. 368 (C. A.).

² *Per Lord Mansfield*, in *Carter v. Boehm*, 3 Burr. 1909.

³ *Vallance v. Dewar*, 1 Camp. 503;

Ougier v. Jennings, *ibid.* 505; *Kingston v. Knibbs*, 1 Camp. 508, note. For further illustrations of the same principle, see *Moxon v. Atkins*, 3 Camp. 209; *Da Costa v. Edmunds*,

Or the established custom during the great French war for a ship insured "at and from London or Ramsgate to Nantes, with liberty to touch at Ostend," to sail direct to Nantes, with false clearances for Ostend, and false bills of lading, purporting to be made at Ostend, and expressing that the goods were shipped there.¹

But to justify this, such usage must be general, and universally known to all engaged in the trade. Thus, a ship was insured in the African wood and ivory trade, without communicating to the underwriters the fact of her intended mutual or combined trading with another ship on the African coast, and it appeared that such mutual trading was of occasional occurrence on such African voyages, but not of universal prevalence; the concealment of this was held to be fatal to the insurance.²

Every underwriter is presumed to be as well acquainted as the assured himself with the general and established restrictions on commercial freedom imposed in different states for the sake of revenue, or fancied protection to their interests;³ but if the prohibition be of recent date, or only occasional in its nature, the assured, supposing him to have private means of information, ought to communicate the fact to the underwriter; if he be himself ignorant of it, of course the rule will not apply.⁴

It is held in the United States that, under an insurance on "all lawful goods," it is not necessary to disclose that they are contraband of war, or that such constitute a part of the cargo.⁵ So, in this country, an American neutral, who

4 Camp. 142; *Stewart v. Bell*, 5 B. & Ald. 238; and the cases decided on the East India trade, as *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Dougl. 419; *Grant v. Paxton*, 1 Taunt. 463; 1 Marsh. on Ins. 259.

¹ *Planché v. Fletcher*, 1 Dougl. 251. See *Barnewall v. Church*, 1 Caines, 217; 1 Phillips, no. 598.

² *Tennant v. Henderson*, 1 Dow,

P. C. 324.

³ *Lever v. Fletcher*, 1 Park, Ins. 507.

⁴ See *Mayne v. Walter*, 1 Marshall, Ins. 478, and the American cases, 1 Phillips, no. 595 *et seq.*

⁵ *Juhel v. Rhineland*, 2 Johnson's Cases, 120, 487; and *Seton v. Low*, 1 Johnson's Cases, 1; cited 1 Phillips, no. 621.

had effected an insurance on goods on board an American ship, did not inform the British underwriter that enemy's property, not included in the goods insured, was also on board the same ship; but this was no bar to his right of recovery.¹

As to the contents of Lloyd's Lists, whether the underwriter being a member of Lloyd's or a subscriber, and as such receiving, or having access to these Lists daily, is to be affected with knowledge thereof, irrespective of its being actual knowledge, so as to be bound thereby in law, has been for many years a matter of great uncertainty, and different opinions expressed upon it by eminent judges on the bench are to be found in the books. For instance, upon an insurance on *The Lusitania* from Brazil to Lisbon being proposed, it was stated that the ship was out fifty-seven days; but the fact that another vessel which had sailed at the same time had arrived at Lisbon ten days before the date of the orders to insure, might have been learned from Lloyd's Lists, and was not stated. Burroughs, J., there held that the policy was not vitiated, on the ground that "what the underwriter by fair inquiry and due diligence may learn from the ordinary sources of information need not be disclosed."² A similar opinion is attributed to Erle, C. J., at Nisi Prius, in the following terms: "Actual knowledge is not essential; if the insurer knew he had the means of knowing the fact, then it was within his knowledge. If, for example, he knew that he could learn the exact cargo at Lloyd's, and chose not to ascertain it, knowing or believing it would include iron, it was within his knowledge."³

Contents of
Lloyd's Lists.

To the same effect seems to be the opinion expressed by Lord Abinger, in banc, in a case where the assured had not only concealed, but had made a misrepresentation as to the time of sailing: he says,—“The materiality of such a

¹ *Barker v. Blakes*, 9 East, 283.

of *Elton v. Larkins*, 5 C. & P. 85; 8 Bing. 198.

² *Friere v. Woodhouse*, 1 Holt's N. P. 572. So, upon the first trial

³ *Foley v. Tabor*, 2 F. & F. 662.

document (Lloyd's Lists) depends entirely on the silence of all parties respecting the day of the vessel's sailing. Where there is no wrong representation about it, no communication calculated to mislead, then the document at Lloyd's is competent evidence, where the means of knowledge are common to both."¹

In that case objection was taken before the Court, in banc, to the admission in evidence on the trial by Maule, J., of Lloyd's Lists, and the learned judge was sustained in thinking them evidence. On this point there seems to be no doubt or ground for doubting, the same point having been frequently ruled as to the admissibility in evidence of a newspaper, which the party against whom it is adduced is proved to take in regularly. It is upon the next point that the difference of opinion exists, namely, the use to be made of it when admitted in evidence, unless the particular entry in it can by evidence be traced to his knowledge.

In *Nicholson v. Power*² there was no occasion to consider the point, because although the same entry had first appeared in Lloyd's Lists, which afterwards appeared in the "Shipping Gazette," and of which no mention was made to the underwriter, the assured had peculiar information from his captain that enabled him to fix the entry as applying to his own ship, and to none other.

In the case of *The Georgia*,³ the assured had omitted to state to the underwriter that the vessel proposed to him had been a Confederate cruiser in the years 1863—1864, and this concealment defeated the policy. The chief difficulty in the case, which will always surround it with much interest, arose upon a question as to the state of knowledge on the part of the underwriter of the omitted fact, and as to the effect of his forgetfulness of it at the time that he took the risk. *The Georgia* had been notorious to the

¹ *Mackintosh v. Marshall*, 11 M. & W. 116. 14 East, 494.

² *Nicholson v. Power*, 20 L. T., N. S. 580. So, *Lynch v. Dunsford*, 595. ³ *Bates v. Hewitt*, L. R., 2 Q. B. ..

British public at the time she was cruising, and after she had been laid up in Liverpool, had been the subject of comment in the London newspapers, and in the House of Commons, as appeared by the published debates. The defendant, one of Lloyd's underwriters in London, had been cognisant of all this. But at the time that the risk was proposed to him, nothing revived his recollection of these things, and it did not occur to him that this was or might be the Confederate cruiser. It was a fact that at the time of the risk being proposed there was no *Georgia* s. s. in Lloyd's Lists. Under these circumstances, the jury found that the defendant was not aware that *The Georgia* he was underwriting was the Confederate cruiser, but that at that time he had abundant means from his previous knowledge, coupled with the particulars supplied by the plaintiff, of identifying the ship. The Court held that the previous knowledge possessed by the defendant of the material fact omitted from the particulars of the risk, as it was not present to his mind at the time of taking the risk, did not release the plaintiff from the obligation to communicate it.

In *Morrison v. Universal Marine Insurance Co.*,¹ the defendants were subscribers to Lloyd's, and the entry found in the "Liverpool Mercury" newspaper, had first appeared in Lloyd's Lists, where however their underwriter did not discover it until after he had initialed the slip, and as the broker admitting his own knowledge of the entry had taken upon him to suppress all mention of it, this concealment defeated the policy. Upon the point here under consideration, Bramwell, B., said: "It is impossible to say that there is any rule of law or any principle or authority which affects the underwriter with knowledge of what is contained in Lloyd's Lists. No doubt some knowledge may be assumed in the underwriter; what,—I will not attempt to define or describe; though, I agree with what was thrown out by my

¹ *Morrison v. Universal Mar. Ins.* 197. Ante, p. 575.
Co., L. R., 8 Ex. 40; on appeal, *ibid.*

brother Cleasby in the course of the argument, that the matters he must take knowledge of are matters of general knowledge, not matters relating to any particular ship. But to hold that the underwriter is bound to carry in his head all that is contained in Lloyd's Lists relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and useless burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner."

This view of the law thus expressed by Bramwell, B., was concurred in by the other members of the Court of Exchequer; and Blackburn, J., presiding in the Court of Appeal upon the same case, expressed his concurrence in this with the Court below.¹

Summary.

So stands the point here in question in relation to judicial authority, which may be gathered from this last case and the case of *Bates v. Hewitt* to have concluded against any presumption of knowledge of particular facts concerning particular ships on the part of the underwriter, merely on the ground that such facts have appeared in Lloyd's Lists, or the "London Gazette," or a newspaper.

General maritime intelligence.

It is a question a good deal canvassed in the United States, how far maritime intelligence inserted in the public papers, and open to all the world, need be stated. The conclusion, upon the whole, appears to be, that such articles of intelligence need not be stated, unless they apply peculiarly to the case of the owner, or he is privately in possession of information which enables him to infer, with more certainty than the rest of the public, that the intelligence in the journals is, in fact, material to the risk.² Mere items of ordinary shipping intelligence in the public papers, equally open to both parties, and too general to lead to any

¹ *Morrison v. Universal Marine Ins. Co.*, L. R., 8 Ex. 197.

² *Nicholson v. Power*, 20 L. T. N. S.

580. See *Bates v. Hewitt*, L. R., 2 Q. B. 595.

particular application to the risk proposed, need not be communicated.¹

If the facts in question are comprised under the head of marine intelligence in papers actually and habitually taken in and filed at the office where the insurance is effected, it seems a fair general presumption, that the insurers "have examined with some care the items of marine intelligence, which are expressly designed speedily to diffuse information on a subject so immediately interesting to them, especially in relation to vessels belonging to their own port."² This is, however, at the highest, only a *prima facie* presumption; no case in the United States has carried it beyond this; and in New York and Massachusetts, the law, we are told by Judge Duer, may be regarded as settled, that in such cases the defence of a concealment is only to be met by direct or circumstantial proof of actual knowledge on the part of the underwriter.³

In the United States.

In one of the cases cited in illustration of this position, the defence set up was, that a letter of the plaintiff alleged to contain material information had been withheld; the answer was, that the same information had appeared in substance in a New York gazette that had been received at the office of the defendants, and was on the file there when the application for the insurance was made. The judge told the jury, that if they thought the newspaper contained all the information the letter did, and was actually seen by the president of the insurance company before he subscribed the policy, and that part of it which contained the information was read by him, then the omission to communicate the letter was immaterial. The jury found for the plaintiff; and, on motion for a new trial, the Court upheld the direction of the judge.⁴

¹ 3 Kent's Com. 285; 1 Phillips, no. 606; 2 Duer, 480, 481; and see the case of *Ruggles v. General Int. Ins. Co.*, 4 Mason, 81, and *Alsop v. Com. Ins. Co.*, 1 Sumner's Rep. 41.

² Per Shaw, C. J., in *Greene v.*

Merchants' Ins. Co., 10 Pickering's Mass. Rep. 402; 1 Phillips, no. 606; 2 Duer, 481.

³ 2 Duer, 481, 482.

⁴ *Greene v. Merchants' Ins. Co.*, *quâ supra*.

Where, from the rate of premium or other circumstances, the fair probability appears to be that the insurer, though regularly taking in the gazette, could not, before completing the insurance, have read the paragraph conveying the information complained of as withheld, the *prima facie* presumption is repelled, and the defence of concealment unanswered.

Court v.
Martineau.

A Liverpool merchant directed his London broker to effect insurance on a prize ship, informing him by letter that should the ship arrive, he (the merchant) would send up an express to communicate the fact. The broker delayed insuring, to give time for the arrival of the express, and none having arrived, effected an insurance at 50 guineas per cent. without saying anything about the non-arrival of the express. It was held that, under the circumstances of the case, and especially the enormous amount of premium, this was not a fatal concealment; the underwriter ought to have inquired.¹

An insurance was effected at New York on a sloop "from Washington, North Carolina, to Charleston, South Carolina." The premium was at the ordinary rate. The sloop had been, in fact, lost on Ocracoke Bar, North Carolina, nine days before the policy was effected. The day before effecting the insurance, the plaintiff had read a paragraph in a New York mercantile gazette stating that information had been received, "that a New York sloop, bound from Washington, North Carolina, to Charleston, South Carolina, had been stranded, Thursday week, on Ocracoke Bar." The plaintiff did not disclose this fact. The insurance company subscribed to and regularly received the gazette in question. It was contended that they must, therefore, be held to be as well acquainted with its contents as the plaintiff. The judge, however, held, the plaintiff ought to have disclosed the fact, and that the concealment was material and avoided the policy.²

¹ Court v. Martineau, 3 Dougl. 161.
See the case stated by Duer, vol. ii.
pp. 568, 569.

² Dickenson v. The Comm. Ins.
Co. of New York, Anthon's N. P. R.
92; 2 Duer, 486, note a. Mr. Phillips,

Judge Duer adds, "The rate of premium was doubtless considered by the judge as such conclusive proof of the ignorance of the underwriter, that it superseded the necessity of submitting the question to the jury. The verdict was in conformity with the charge of the judge, and no attempt was made to disturb it. In New York the propriety of the decision has never been questioned."

Another principle laid down by Lord Mansfield in the celebrated judgment already cited, is, that nothing need be disclosed to the underwriter which he himself waives being informed of. Thus, to take the illustration given by his Lordship in the same case:—"If the insurance be on a private ship of war, from port to port, the underwriter needs not to be told of the secret enterprises it is destined upon; for, from the nature of the contract, he waives this information."¹

Nothing need be disclosed which the underwriter impliedly waives being informed of.

In case of privateer.

Upon this principle, an insurance on ship for a homeward voyage "at and from" a foreign port, implies that, in all probability, repairs will be required before she can sail on her homeward voyage; the fact, therefore, of such repairs being requisite need not be communicated; the underwriter, if he wishes for particular information on the point, ought to ask for it.² So, where a ship is insured "at and from" her home port, "lost or not lost," it is not necessary to disclose that she has, in fact, sailed before the policy is effected; for, if the underwriters want to be satisfied as to this point, they ought to inquire into it.³

Need of repairs.

Lost or not lost.

A policy "at and from" a foreign port by no means implies that the ship is already at the port in question, and consequently information that she is not then there is not

Whether at foreign port. Hull v. Cooper.

in his statement of the case, adds a fact that makes the decision still stronger, viz., that on account of the intelligence, another office had, in the earlier part of the same day, refused the risk; 1 Phillips, no. 606. See

Nicholson v. Power, 20 L. T., N. S. 580.

¹ Carter v. Boehm, 3 Burr. 1909.

² Beckwith v. Sydebotham, 1 Camp. 116.

³ Fort v. Lee, 3 Taunt. 381.

required.¹ But as it is implied in such a policy that the vessel will be there within such a reasonable time as that the risk shall not be varied by the delay, it would seem that the assured ought to communicate any information possessed by him that this reasonable time is likely to be exceeded.² Yet if such delay in excess be excused by a general usage, such usage is one of those things that the underwriter is bound to know, and therefore need not be mentioned in the particular case.³

Seaworthi-
ness.
Shoolbred v.
Nutt.

On the same principle the assured under a voyage policy need not proffer any disclosure to the prejudice of the ship's seaworthiness; the underwriter waives his right to the information, trusting entirely to the implied warranty. Hence, in an action on a policy "at and from Madeira to Charleston," it was held that the captain's letters from Madeira to the owner, stating that the ship had been very leaky on her voyage thither, need not be communicated. "It is a condition, or implied warranty, in every policy, that the ship is seaworthy, and therefore there is no necessity for a representation of that. If she sail without being seaworthy the policy is void."⁴

Haywood v.
Rodgers.

So, where the owners of a ship insured "at and from Trinidad to London," &c., without communicating the captain's letter, stating that he had been obliged to have a survey on the ship at Trinidad "on account of her bad character;" or the survey which accompanied the letter and gave the ship a good character: it was held, that the non-disclosure of this letter and survey to the underwriters did not vacate the policy, though it appeared in evidence that such circumstance, if known, would have enhanced the premium.⁵

¹ Hull v. Cooper, 14 East, 479.

² De Wolf v. Archangel Marit. Bk. & Ins. Co., L. R., 9 Q. B. 451.

³ Per Tindal, C. J., in Mount v. Larkins, 8 Bing. 108, 121.

⁴ Per Lord Mansfield, Shoolbred v. Nutt, 1 Marsh. Ins. 474.

⁵ Haywood v. Rodgers, 4 East, 590. See also Beckwith v. Sydebotham, 1

Camp. 116. The decisions in the United States follow the law as thus laid down. See Walden v. New York Firemen's Ins. Co., 12 Johns. 128; De Wolf v. New York Firemen's Ins. Co., 20 Johns. 214; 3 Kent, Com. 281; 2 Duer, 523; 2 Parsons, 178.

The owner of a vessel classed A 1 for seven years at Lloyd's refused to subject her to the half-time survey (indicated when undergone by H. T. in the Register), which refusal by Lloyd's rules involved her being struck off the Register, but before she was struck off he effected a policy on her without mentioning this refusal; this was held, by the majority of the Court (*dissentiente* Cockburn, C. J.), to be no ground for defeating the policy.¹

If, indeed, the underwriter particularly calls for information on the subject, then the assured must disclose truly all that he knows as to the particulars required. The principles upon which this doctrine rests are thus clearly and admirably stated in Lord Ellenborough's judgment in the case of *Haywood v. Rodgers*:—"It certainly," said his Lordship, "would have some weight in guiding the judgment of the underwriter to know how old the ship was: where she was built, whether originally British or foreign; what was the form of her construction, whether clinker built or not, whether copper bottomed or not; what repairs she had received, and when, and in what dock those repairs were done to her, and how lately before the voyage insured; and if the voyage were, as this was, a voyage home, what accidents the ship had met with on the outward voyage. All this may be very proper and convenient for an underwriter to be informed of, before he takes upon him the risk, and all this may be asked of the assured; and if he should withhold, on being asked for it, any material part of such required information, his policy could not be sustained for a moment; for such a suppression would be a fraudulent concealment of material facts, which has always been considered as avoiding the policy. But the question is, Is it the duty of the assured, in the first instance, and as a condition precedent on his part, to inform the underwriter of all these circumstances to the extent of his, the assured's, own actual knowledge on the subject?" His Lordship answers this question in the negative.

Aliter if he inquires.

¹ *Gandy v. Adelaide Mar. Ins. Co. (coram Q. B.), 25 L. T., N. S. 742.*

Inherent vice. On the same principle the assured on perishable goods is not bound to make any disclosure as to whether they were in a damaged condition; and yet, if they have been put on board in such a state as to produce, *e. g.*, spontaneous combustion, and are thereby consumed, the assured can make no claim in respect of the loss which he has himself thus occasioned.¹

More than enough.

Upon the same principle it has been decided that the assured need not, unasked, disclose all the bygone calamities that have befallen the ship, or produce his whole portfolio of letters; it is enough, in the first instance, if he communicates fully and truly all material facts relative to the state the ship was in, at the time the last intelligence left her; and it is for the underwriters to require further information if they wish it, especially where the letter laid before them expressly refers to a prior communication as to the state of the ship in the earlier part of the same voyage.²

Apprehensions.

Although it be fatal to misrepresent that previous underwriters have taken the proposed risk at the same or a lower premium than that offered,³ yet the assured is not bound to disclose the estimate formed by other underwriters of the risk, that they have declined it, or what their apprehensions or opinions were respecting it.⁴ Nor need he communicate the fears and apprehensions of foreign correspondents: it is enough to state the facts on which such apprehensions are founded.⁵

Nor what lessens the risk.

"The assured," says Lord Mansfield, "need not disclose what lessens the risk agreed and understood to be run."

Thus, to take the instances furnished by his Lordship: "If the underwriter insures for three years, he needs not to be told any circumstances to show it may be over in two:

¹ *Boyd v. Dubois*, 3 Camp. 133.

² *Freeland v. Glover*, 7 East, 457.

³ *Sibbald v. Hill*, 2 Dow's P. C. 263.

⁴ So held in the United States:

Ruggles v. General Int. Ins. Co., 4 Mason, 74; *Clason v. Smith*, 3 Washington's Circ. R. 156; 1 Phillips, no. 578.

⁵ *Bell v. Bell*, 2 Camp. 475.

so if he insures a voyage, with liberty of deviation, he needs not to be told what tends to show there will be no deviation.”¹

Material facts, brought to knowledge after orders given to insure, ought to be forwarded with the utmost degree of reasonable diligence, so as to reach before the contract is actually made.² And if the countermand is not in time, owing to the fraud, negligence, or mistake of the agent, the agent's fault will be that of the principal.

Subsequently
acquired
knowledge.

As there is a complete contract as soon as the slip is initialed, the policy is not defeated by the non-communication of anything coming to the knowledge of the assured after that.³

The materiality of the facts concealed is a question mainly for the jury, whose finding thereon is not lightly disturbed by the Courts, unless it be against the weight of evidence, or be the result of erroneous direction by the judge presiding at the trial.⁴

Materiality of
the conceal-
ment—how
proved.

Whether the jury, in forming their judgment upon the materiality of the fact concealed, may be assisted by the evidence of skilled witnesses, such as brokers, underwriters, &c., called to give their opinion whether the fact, in their judgment, was likely, if communicated to the underwriter, to have materially influenced him in his estimate of the risk, is a question that has been very much canvassed in this country, and must be regarded as still undecided.

Evidence of
skilled wit-
nesses.

¹ *Carter v. Boehm*, 3 Burr. 1909.

10 C. P. 189; *Wake v. Atty*, 4 Taunt. 493.

² *Grieve v. Young*, *Millar on Ins.* 65; and see the cases in the United States, collected by Mr. Phillips, vol. i., no. 561.

³ *Ionides v. Pacific Ins. Co.*, L. R., 6 Q. B. 674; *Cory v. Paton*, L. R., 7 Q. B. 304; *Lishman v. Northern Marit. Ins. Co.*, L. R., 8 C. P. 216;

⁴ See *Willes v. Glover*, 1 B. & P. N. R. 14; *Bridges v. Hunter*, 1 M. & Sel. 15; *Elton v. Larkins*, 8 Bing. 198; *Westbury v. Aberdein*, 2 M. & W. 267; *Mackintosh v. Marshall*, 11 M. & W. 116; *Stribley v. Imperial Mar. Ins. Co.*, 1 Q. B. Div. 507.

Lord Mansfield,¹ Sir Vicary Gibbs,² and Lord Denman,³ have maintained that the evidence is inadmissible, on the ground that it is not a question of science in which scientific men will mostly think alike, but a question of opinion, liable in the most reasonable minds to be affected by fancy, and in which the diversity might be endless; that it is a mere statement of the views entertained by the witness of matters of legal and moral obligation, and on the manner in which others would probably be influenced if the parties had acted in one way rather than another; finally, that it is an opinion which, however rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause, and therefore is irrelevant and improper in the mouth of a witness.

On the other hand, Lord Kenyon,⁴ Holroyd, J.,⁵ Lord Tenterden,⁶ and Tindal, C. J.,⁷ have all held this evidence admissible; and it has also been admitted without objection, in two reported cases, which came respectively before Sir James Mansfield⁸ and Lord Ellenborough,⁹ in the former of which it had a material influence on the judgment, both of the Court and jury.

The grounds upon which these learned persons have held the evidence admissible, are that in questions on the arts and sciences, the evidence of persons versed in those arts is daily admitted; that the materiality of any matter can only be ascertained by the evidence of persons conversant with the subject-matter of inquiry; and that neither judge nor jury could arrive at a proper conclusion on such a point if

¹ In *Carter v. Boehm*, 3 Burr. 1909.

² At N. P., in *Durrell v. Bederley*, 1 Holt, 283.

³ In *Campbell v. Rickards*, 5 B. & Ad. 840, the latest case on the point.

⁴ *Chaurand v. Angerstein*, Peake's N. P. 43.

⁵ *Berthon v. Loughman*, 2 Stark. 229.

⁶ *Rickards v. Murdock*, 10 B. & Cr. 527.

⁷ *Chapman v. Walton*, 10 Bing. 57. See also *Elton v. Larkins*, 5 C. & P. 392, tried the year before the decision of *Chapman v. Walton*, and *Campbell v. Rickards*.

⁸ *Littledale v. Dixon*, 1 B. & P. N. R. 151.

⁹ *Haywood v. Rodgers*, 4 East, 590.

unassisted by the evidence of skilled witnesses, because they could not have the experience upon which alone a judgment could be satisfactorily formed.

As far as judicial decisions are concerned, the law in the United States on this point is in the same unsettled state as our own; but the more recent authorities in that country, including Chancellor Kent,¹ Story, J.,² and Judge Duer,³ are all in favour of the admissibility of this evidence.

In the United States.

The arguments in favour of the admission of this evidence far outweigh in the opinion of Mr. Arnould those which have been urged against it. As a matter of practice, the evidence of underwriters and brokers on such questions is being more and more resorted to, sometimes on both sides, and frequently by one side without objection by the other, the judge making no difficulty when no objection is made by counsel.

The burthen of proof of concealment lies on him who pleads it. No doubt it must have been a question of some difficulty, so long as parties to the cause could not be examined as witnesses, how far the defendant was obliged to carry his negative evidence before the presumption was sufficiently turned in his favour to compel the plaintiff to produce rebutting evidence. In the present state of the law it would not be safe for the underwriter defending, if the policy was effected with him personally, to refrain from giving evidence in person under this plea. It must moreover be proved on his behalf,—1, that the facts were known to the plaintiff before the initialing of the slip; and, 2, that these facts were of such a nature that, if communicated, it is unreasonable to suppose that the underwriter would have taken the risk, at all events, on the same terms.⁴

Onus et modus probandi.

¹ 3 Kent, Com. 284, note.

² Per Story, J., in *M'Lanahan v. Universal Ins. Co.*, 1 Peter's S. C. R. 188, cited in 2 Duer, 786.

³ 2 Duer, Ins. 783-789.

⁴ Per Blackburn, J., in *Ionides v. Pender*, L. R., 9 Q. B. 531; and in *Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. Div. 507; 2 Duer, Ins. 685, 686.

The law of
election in
relation to
concealment.

Upon the discovery of the fact that the contract has been induced by concealment, arise the right and duty of the party deceived to elect whether he will affirm or disaffirm the contract. The law touching this right and duty was considered by the Court of Appeal in relation to the facts in *Morrison v. The Universal Marine Ins. Co.*¹ The London broker of the plaintiff, being informed of an entry in a Liverpool newspaper, copied, as it afterwards appeared, from Lloyd's List, that *The Cambria*, qy. *Cameo*, from New Orleans, was aground on the North Breakers, suppressed all mention of it to the defendants, who, in ignorance of it, accepted the risk, and initialed the slip on the 12th of October. Two hours afterwards the defendants' underwriter met the broker in Lloyd's rooms, and drew the attention of the latter to the entry, who admitted that he had had knowledge of the entry for some time. The policy duly executed was delivered out by the defendants to the broker on the 15th, without protest or observation. On the 19th it was known that the ship was lost, and on the 20th, the defendants informed the broker that they did not hold themselves liable on the policy. It was contended on the part of the plaintiff that the defendants by delivering out the policy under the circumstances without protest had irrevocably made their election to stand by the contract.

Blackburn, J., at the trial, told the jury that the defendants upon coming to a knowledge of the concealment might elect either to go on with the contract nevertheless, or to return the premium and announce that they did not consider themselves bound by the policy: but that they were bound to make their election within a reasonable time. And he put the question to the jury, whether the defendants in delivering out the executed policy meant to elect to go on with the contract. The jury answered this in the negative.

The Court of Exchequer (Martin, Bramwell, and Cleasby, BB.) were of opinion against the defendants. But the Court

¹ *Morrison v. Universal Mar. Ins. Co.*, L. R., 8 Ex. 40, 197.

of Appeal reversed the judgment below, and in stating the law respecting election they adopted the observations of the same Court, made in *Clough v. London and North Western Railway Company*, on appeal,¹ a case of electing to avoid a contract on the ground of fraud. In that case it was said: "The fact that the contract was induced by fraud did not render the contract void or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. The contract continues valid till it is avoided by election; election is made by express words or by act; but an election once made shall be determined for ever. We think the party defrauded may keep the question open so long as he does nothing to affirm the contract. So long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delaying, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time, without rescinding, will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined." Applying these principles to the case before them, and finding it clear upon the evidence that the plaintiff had suffered no injury by the delay and silence of the defendants, and so far from having been deterred thereby from making further insurances, that he had tried to do so and been unable, the Court held that the election on the part of the defendants was in due time, and consequently that the policy was void.²

¹ *Clough v. London and North Western Rail. Co.*, L. R., 7 Ex. 34. The judgment in this case was pre-

pared by Lord Blackburn.

² *Morrison v. Universal Mar. Ins. Co.*, L. R., 8 Exch. 197.

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